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N-27
No. 13352

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[Handwritten signature]

JULES D. GRATIOT and AIR-MAZE CORPORATION,

Appellants,

vs.

FARR COMPANY, a corporation,

Appellee.

OPENING BRIEF OF APPELLANTS.

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JULES D. GRATIOT and AIR-MAZE CORPORATION,

Appellants,

vs.

FARR COMPANY, a corporation,

Appellee.

OPENING BRIEF OF APPELLANTS.

I.

Statement of Jurisdiction.

Jurisdiction of the District Court in this action is founded upon the patent statutes of the United States [Complaint, R. 3], and this is admitted by the defendants [Answer, R. 40]. The District Court's judgment was entered on February 27, 1952 [R. 67], and appellants' notice of appeal was filed on March 4, 1952 [R. 72]. Jurisdiction of the District Court is therefore founded upon Title 28, Section 1338, of the United States Code, and jurisdiction of this Court of Appeals is founded upon Title 28, Section 1292(4), of the United States Code.

II.

Statement of the Case.

A. The Parties.

Plaintiff and appellee Farr Company (hereinafter referred to as "plaintiff") is a corporation, and is in the business of making and selling air filters and related items.

Defendant-appellant Air-Maze Corporation (hereinafter referred to as "defendant" or "Air-Maze") is a corporation, and for many years has been engaged in the manufacture of a large number of different products [R. 324-334] including air filters.

Defendant-appellant Jules D. Gratiot, an individual, is a California factory representative of Air-Maze, promoting the sale of Air-Maze products on a commission basis. He was joined as a party solely to obtain venue as to Air-Maze and, since the propriety of such venue is not an issue on this appeal, neither Mr. Gratiot nor his activities need be separately considered on this appeal.

B. The Issue.

The Complaint charges infringement of U. S. Letters Patent No. 2,286,479 [PX-1, R. 839], issued on June 16, 1942, to Morrill N. Farr, on "Air Filter Panel" (hereinafter sometimes referred to as the "'479 patent"), and subsequently assigned to plaintiff Farr Company. By a "More Definite Statement" [R. 14], plaintiff charged that claims 4, 5, 7, and 8 of said Letters Patent were infringed by defendants, and only such claims are here in issue. By such "More Definite Statement" [R. 14], plaintiff also charged that the Air-Maze Type P-5 and P-5-R type air filter panels were the alleged

infringing devices. No distinction was made in the evidence between said P-5 and P-5-R air filter panels, and only the Air-Maze P-5 need be considered on this appeal. It is exemplified by physical Exhibit PX-12.

The action was tried before the Honorable Peirson M. Hall, United States District Judge. The District Court's Opinion [R. 819], judgment [R. 67] and Conclusions of Law [R. 65] held claims 4, 5, 7, and 8 of the patent in suit valid and infringed by the Air-Maze P-5 air filter panel, and awarded an injunction against further manufacture and sale thereof by defendants. Upon the posting of a \$10,000.00 bond by defendants, the injunction was stayed pending appeal [R. 73].

The only two general issues before this Court on the appeal are as follows:

- (1) Are claims 4, 5, 7, and 8 of U. S. Letters Patent No. 2,286,479 in suit valid at law?
- (2) Are claims 4, 5, 7, and 8 of said Letters Patent in suit infringed by the Air-Maze P-5 air filter panel?

For brevity, plaintiff's exhibits are sometimes referred to herein as "PX" and defendants' exhibits as "DX," and all emphasis is ours unless otherwise noted.

C. The Witnesses.

At the trial, plaintiff called three witnesses: *R. S. Farr*, son of the patentee of the '479 Farr patent in suit and president of the plaintiff corporation [R. 255-256]; *M. S. Farr*, a brother of *R. S. Farr* and an officer of the plaintiff corporation [R. 292]; and *Sydney F. Duncan*, age 47, a professor of mechanical engineering

at the University of California, who has been a technical consultant for the plaintiff since it commenced business some years ago [R. 100-102] and is currently a full-time paid employee of the plaintiff for a year's period [R. 245]. Mr. Duncan testified as a filter expert, but admitted that most of his filter experience has been with the Farr Company filters, and that he has had little experience with other types [R. 175-177]. It is thus plain that all three of plaintiff's witnesses were strongly biased in its favor. It should be added that M. N. Farr, the patentee of the '479 patent in suit, was deceased long prior to this litigation.

Four witnesses testified on behalf of defendants: *W. B. Watterson*, sales manager for defendant Air-Maze [R. 323]; *K. F. Russell*, a mechanical engineer, who has been employed by the Vortox Company of Claremont, California, for twenty-two years and is now general manager and chief engineer of that company, a competitive air filter manufacturer [R. 343], and neither he nor his company has any interest in the outcome of this litigation [R. 358]; *Frank B. Rowley*, Professor Emeritus in Mechanical Engineering at the University of Minnesota and a consulting mechanical engineer, with over forty years' research experience in the field of air conditioning and air filters, being a member of many national technical societies and being at one time president of the American Society of Heating and Ventilating Engineers, being listed in "Who's Who in America," "Who's Who in Engineering," and "American Men of Science," having for over twenty-five years done a large amount of research work to determine the fundamental properties of air filters and dust in the air, and has done a large amount of consulting work for various indus-

trial concerns on the development and testing of air filters [R. 476-479]; and *R. E. Brown*, assistant chief engineer of defendant Air-Maze [R. 684]. Mr. Waterson and Mr. Brown were, admittedly, interested witnesses, but, it is submitted, Mr. Russell and Mr. Rowley are men of the highest qualifications in the filter art and entirely unbiased.

D. The Farr '479 Patent in Suit—Generally.

The Farr '479 patent in suit [PX-1, R. 839] discloses and claims an air filter for filtering dust from air. As shown in the Farr Co. catalogue, PX-7, such filters made under the '479 patent in suit are either rectangular or round [R. 200-201], the Farr rectangular filter being exemplified by PX-2 [R. 108] and the round Farr filter being exemplified by DX-D [R. 309].

The filter material, or "media," of the '479 patent and the commercial Farr Co. filters is illustrated by physical exhibit PX-3. It consists of alternate crimped and flat sheets of wire screen (ordinary "fly" screen) assembled to form a filter element. In it the crimped screen sheets provide corrugations which are "V" shaped both in cross section and in plan view (to make a "herringbone" pattern), as best shown in Figs. 3 and 4 of the '479 patent. In it the corrugations (*i. e.*, "herringbones") in all of the crimped sheets of wire screen are parallel when looking down from the top, and this is an important point to note, as will be shown hereinafter. It is also important to note that only this single form of the alleged Farr invention is disclosed in the '479 patent in suit [R. 359]. In the Farr '479 filter, as stated by the applicant in the file-wrapper of the application therefor [R. 921, 922], the "V-shaped" cor-

rugations in the crimped sheets of fly screen co-operate with the adjoining flat screens to form open *triangular-shaped* passages that extend through the filter from front to back, which passages are bounded on all sides by wire screen.

Prior to operation, the Farr filter of the '479 patent in suit is preferably dipped in oil so as to coat the wires of the filter media, to act as an adhesive aiding in the collection of dust, and allowed to drain of excess oil. The filter is then ready to be installed for use.

Air filters of the general type of that shown in the Farr '479 patent are adapted for a variety of industrial and domestic uses. They are placed in air ducts in ordinary heating and ventilating systems of conventional domestic and industrial types [R. 278], are used in air intakes for Diesel railroad engines, for grease eliminators to remove liquid droplets of grease from air in restaurants [R. 210], for use on the air intakes of internal combustion engines and carburetors therefor [R. 278-279], and for other specialized purposes. All of such uses were old in the filter art.

In operation, dust-laden air is blown or drawn through the Farr '479 filter. When the filter media is clean of dust, the air tends to pass straight through the filter, passing directly through the screens, which causes substantial turbulence in the air flow. Particles of dust carried by the air thus tend to hit the wire of the screens and stick thereto, thus filtering the dust from the air. Such filters are termed "impingement type" filters, because they remove the dust by impinging it against solid collecting surfaces (wire, in the '479 filter) [R. 759-761]. Impingement type filters are generally old and well known in the art.

In the operation of the Farr '479 filter, dust tends to collect and adhere to the wire screen first adjacent to the inlet or upstream face and to a less degree throughout the depth of the filter element. As the mesh openings in the wire screen near the upstream face become clogged with dust, the air cannot pass therethrough but instead passes *along* the open triangular passages, formed by the V-shaped corrugations and the flat screen, until the air comes to openings in the mesh and then partially passes therethrough. Thus, the Farr filter of the '479 patent progressively fills with dust from front to back, and this is termed in the evidence as "progressive loading." Such "progressive loading" is admitted by the plaintiff and its witnesses to be old in the air filter art, as will be shown hereinafter.

In the filter of the '479 patent, as the dust load increases, the efficiency (*i. e.*, ability to remove dust from the air) decreases, and the pressure drop across the filter increases, and plaintiff's expert Duncan fixed the life of the 20" x 20" Farr filter in evidence, as the time it takes to collect a dust load of 500 to 600 grams of dust [R. 183-184]. The filter then must be cleaned of all dust, following which it can be re-oiled and put back in service.

Plaintiff asserts that filters made in accordance with the '479 patent in suit obtain a high dust-removal efficiency combined with a low increase in pressure drop across the filter as it loads with dust. This was the stated general object of the '479 patent [PX-1, Col. 1, lines 6-11, R. 840]. Much of the record is devoted to extensive inquiry into the relative operating characteristics of the '479 filter, defendants' accused P-5 filter, various other types of filters and details of testing procedure. We sug-

gest that this was a by-path away from the principal issues and profitably may be largely ignored by this Court. A brief summary of the evidence on this question, however, may be helpful.

Prior to suit, extensive *ex parte* tests were made separately by the experts for plaintiff and for defendant Air-Maze. Extensive graphs of curves were put in evidence by both sides, showing comparative efficiencies and pressure drops of the various filters tested. There are many differences in such graphs and they superficially appear to be in conflict. This is not the case, however. The evidence established that Professor Rowley, defendants' expert, in conducting his tests, reflected in defendants' curves in evidence, employed a conventional test dust ("80-20" dust) widely employed by others in testing such air filters [R. 490-491; 580-582], whereas Mr. Duncan, plaintiff's expert, used a special test dust ("Arizona road dust") which no one else employs in such testing [R. 288; 492-493]. Both experts agreed that it is difficult to compare test results made with diverse dusts [R. 574; 718-719]. Both agreed that the differences in their respective test curves resulted primarily from the fact that they had used different test dusts [R. 732-733].

At the suggestion of the District Court [R. 657-659], during the trial the parties jointly made a test of the Farr '479 filter using the standard test dust employed by Professor Rowley, and its results were plotted as an overlay "80-20" curve on DX-VV [R. 680-681]. The *only* difference in these two tests was in the dust used. It gives an entirely different picture as to both efficiency and pressure drop of the Farr '479 filter than that presented by plaintiff's curves originally embodied in PX-13 upon which the "80-20" curve was plotted in DX-VV. The

long and the short of the entire controversy as to the respective tests of the parties is that in filter testing you can obtain about the kind of a performance curve that you want by selecting a particular test dust. We suggest that plaintiff, in its tests, wished to present as pretty a picture as possible of good filtering efficiency and relatively low pressure drop as to both its '479 filter and the accused Air-Maze P-5 filter, and merely selected a test dust that would give such test results. We do not criticize plaintiff for this, but merely point out the fact.

It is uncontroverted that the plaintiff Farr's '479 filter and defendant's P-5 filter have generally similar performance characteristics in dust-removal efficiency and a relatively low rise in pressure drop when the respective filters are clean [R. 603-604]. However, as pointed out by defendant's expert Professor Rowley, the P-5 (and, by the same token, plaintiff's '479 filter) is not a remarkable filter, having only a good average dust-removal efficiency and a low pressure drop [R. 602].

In air filters of the general type here considered, a pressure drop rise up to 0.5 inch of water during their normal life is permissible for most commercial installations [R. 184-185; 339], which is higher than that of either the Farr '479 or Air-Maze P-5 in terms of plaintiff's claimed pressure drop rises, but a large part of the commercial demand is for air filters having efficiencies materially higher than either [R. 600-601] and well above 90%, which neither the Farr '479 nor the P-5 filters can attain as is conclusively shown by the evidence in this action.

As pointed out by the expert Rowley, pressure drop in such an air filter is adjustable, and if the designer wants a high efficiency, he cannot also get a low pressure drop,

the pressure drop rising with the efficiency [R. 604]. Obviously, the '479 filter is a compromise between these factors, having only a moderate efficiency and a low pressure drop.

During the prosecution of the application for the '479 patent, the plaintiff and its representatives and counsel represented to the Patent Office that the Farr '479 filter had an average filtering efficiency greatly in excess of 90% [R. 875], but such fantastic claims have been abandoned here, and, it may be presumed, such claims were made to induce the Patent Office to issue the '479 patent in suit.

Performance characteristics similar to those of the Farr '479 filter and the Air-Maze P-5 may be obtained, of course, without infringing any of the claims of the '479 patent. It is not unique in such characteristics. Thus, Air-Maze for many years made and extensively sold a filter known here as the "P-5 Obsolete" which was almost identical in structure with its accused P-5 and which plaintiff does not charge infringes the '479 patent [R. 90-91]. Mr. Farr, president of plaintiff, admitted that the "P-5 Obsolete" had the same operating characteristics as the Farr '479 filter [R. 267]. Similarly, the Vortex Company, a competitive air filter manufacturer, makes and sells air filter panels which are directly comparable in filter efficiency, pressure drop, and sales price to the Farr '479 filters and the Air-Maze P-5, but which have no wire mesh whatever in them and do not infringe the '479 patent [R. 344-355]. Furthermore, a conventional competitive filter is the "electrostatic" type, which is very efficient, can be designed for low pressure drop, and does not infringe the '479 patent [R. 217-218; 517]. As shown by Plate I, bound at the end of this brief, other prior art filters,

notably the Air-Maze Type B [PX-5], and the Detroit Air Filter, have characteristics quite similar to those of the Farr '479 filter here in suit.

Thus, while the '479 filter may be a good filter, it is not alone in its field and enjoys lots of healthy competition with non-infringing types of filter panels. Its operating characteristics, certainly, are not in any way unique.

E. The Alleged Invention of the '479 Patent in Suit.

Plaintiff's counsel very properly admitted before the District Court that all of the individual elements of the filter of the '479 patent in suit (and claims 4, 5, 7 and 8 in suit) are separately old in the prior art [R. 803]. This was also plainly admitted by plaintiff's expert Duncan in his chart, PX-32 [R. 986-986-A], purporting to distinguish the claims in suit from the prior art. Consequently, the patent in suit covers no more than an alleged combination of old elements.

The District Court's Findings of Fact, drafted by plaintiff's counsel, wholly fail to identify the alleged invention of the '479 patent in suit. They are strangely silent on this critical issue. We, like this Court, must therefore attempt to guess as to what plaintiff will contend on this appeal is the alleged invention of the patent in suit.

Plaintiff's counsel in the Court below initially conceded that the angled, or abrupt, *change of direction* of the passages through the filter is an essential element [R. 813-814], and, in fact, *was the "invention"* residing in the '479 patent in suit.

This was stated by plaintiff's counsel as follows:

"Any fair reading of the prosecution of the Farr application for the patent in suit demonstrates that

from the start to finish of that prosecution Farr asserted that his invention resided in these passages changing in direction; *that this was the invention sought to be claimed.*" [Pltf. Memo. in Opp'n to Motion for Summary Judgment, p. 19.]

F. Background of the '479 Patent in Suit.

The history and background of the '479 patent in suit are helpful in attempting to determine what, if any, invention resides therein.

The application for the '479 patent was filed in the Patent Office on April 4, 1940, and it states that it was a "continuation" of an earlier application, Serial No. 285,904, filed on July 22, 1939. The file-wrapper of the application for the patent in suit is in evidence as Plaintiff's Exhibit 1A [R. 843-938], and the file-wrapper of the earlier application Serial No. 285,904, later abandoned, is in evidence, as Plaintiff's Exhibit 1B [R. 939-955]. The first commercial sale of an air filter embodying the alleged invention of the patent in suit was March 23, 1940 [R. 316], and plaintiff, while relying upon the abandoned application Serial No. 285,904 to establish a date of invention of July 22, 1939, for the '479 patent in suit, made no attempt to establish any earlier date of invention. Consequently, plaintiff is limited by its own admissions to a date of invention not earlier than July 22, 1939, the filing date of the abandoned application.

The plaintiff, however, in the fall of 1937 commenced to make and sell an *air cleaner and cooler*, the first commercial sale being made on November 19, 1937 [R. 310-311]. Such devices have been made and sold commercially by the plaintiff since that date, and were made as illustrated in Farr patent No. 2,286,480 [R. 232, 304], here-

inafter referred to as the "Farr '480 patent," which is in evidence as DX-B [R. 1031]. Such device is referred to hereinafter as the "Farr '480 device."

The Farr '480 device, so far as the construction of the filtering media is concerned, was substantially like that of the Farr '479 patent in suit, as will be shown in detail hereinafter (pp. 43-46). For the present, it is sufficient to say merely that the uncontroverted evidence was that the only structural difference is that in the '479 filter there is a *change in direction* (*i. e.*, a "bend"), of the corrugations, whereas in the '480 device there is none. As pointed out above, this difference was asserted by plaintiff in the Court below as constituting the invention.

G. Patent Office History of the '479 Patent in Suit.

Plaintiff has conceded that the application for the '479 patent here in suit is a "continuation" of the earlier-filed Serial No. 285,904 [R.], and that the proceedings on the abandoned application PX-1B and the application for the '479 patent in suit PX-1A are all part of one transaction [R.]. Plaintiff states that while the '479 patent in suit shows only *one* form of the alleged invention (*i. e.*, alternate flat and crimped sheets of wire mesh), abandoned Serial No. 285,904 showed a number of other forms, including: (a) the "preferred" form shown in Figs. 1 to 4 of the Serial No. 285,904 drawing in which there are *no flat sheets of wire mesh*, and alternate corrugated sheets are disposed so that the crimps, or corrugations, are *inclined in opposite directions*; (b) the form shown in Figs. 5, 6 and 7 in which there are alternate corrugated and flat screen sheets, but no change in direction in the corrugations; and (c) Figs. 9 and 10, in which the corrugations change direction and flat screens optionally may

or may not be employed [R.]. Plaintiff concedes that the form shown in the '479 patent in suit was shown only by Figs. 9 and 10 of the abandoned Serial No. 285,904 [R.].

It is important to note that in the abandoned application Serial No. 285,904, the "preferred" form of the alleged invention was shown in Figs. 1, 2 and 3 [R. 951], in which there were *no flat screen members* and in which the "valleys" (*i. e.*, corrugations) of adjacent crimped screen members are *oppositely inclined*. As best shown in Fig. 3, the corrugations of one strip are angled in one direction relative to the face of the panel and the corrugations of the next adjacent strip are oppositely angled so that adjacent sheets are in contact *only* where the crests of the corrugations cross. By plaintiff's admissions, this form was not disclosed in the specification or drawing of the application for the '479 patent in suit. This form was also specifically claimed in claim 6 of the abandoned application, which was rejected by the Patent Office as unpatentable over the art [R. 953] and allowed by the applicant to become abandoned [R. 955]. As will be shown hereinafter, this specific form, not carried over into the '479 patent, substantially corresponds with defendants' accused air filter.

The application for the '479 patent, PX-1A, discloses in its specification and drawing only a single form of the alleged invention, *i. e.*, that in which there are alternate flat and crimped sheets of screen in which the corrugations of the crimped screens were provided with a "bend" or

“change of direction.” We thus have here the rather unusual situation of an applicant filing a first application disclosing a number of forms of the alleged invention, and then filing a second application confined in its disclosure to only a single form. We shall contend hereinafter that this resulted in an express abandonment of all forms not carried over into the application for the '479 patent in suit, and that, since defendants' accused filter is one form shown and claimed in the abandoned application and not carried over into the '479 application, there can be no infringement.

Plaintiff's counsel asserted that an essential element of the '479 patent in suit was a plurality of sheets of crimped wire screens arranged parallel to the direction of air flow and forming passages through the filter [R. 813]. Such a construction was claimed by original claim 1 of the application for the '479 patent [R. 850], was rejected by the Patent Office [R. 855, 886], and was cancelled by the applicant [R. 915]. This, then, cannot be the invention.

Plaintiff's counsel also asserted that the “progressive loading” of the '479 patent provided a new “mode of operation,” in which part of the air goes through the screens and part along the passages [R. 814]. Original claims 10 to 14, inclusive, were submitted by the applicant Farr in his application for the '479 patent [R. 903], which attempted to cover broadly such “progressive loading,” but they were withdrawn and cancelled by the applicant [R. 915]. Such “progressive loading” cannot be the invention, and this is confirmed by plaintiff's expert Duncan

who admitted in his prior art chart, PX-32 [R. 986-986A], that such progressive loading was old in the prior art patents to Henshall, Orem, and Merryweather.

During the prosecution of the application for the '479 patent in suit, plaintiff's present counsel, as solicitors for the applicant, erroneously represented to the Patent Office that

“Previous to the invention of the air filter of the above-entitled Farr application, *all air filters* intended to remove dust from air by employing the property of wire mesh to retain dust particles on the impingement of the particles thereagainst were constructed with the plane of the wire mesh at right angles to the intended direction of passage of the air through the filter panel” [R. 880],

and filed an affidavit to this same effect by R. S. Farr [R. 858], son of the applicant and now president of the plaintiff corporation. At the trial below, Mr. Farr testified that all his statements in such affidavit were still true [R. 275], although plaintiff's expert Duncan freely admitted that it was old in the prior art patents to Orem, Merryweather, and Row (British), and in the Farr '480 device, to use wire screen generally parallel to the air flow and not at right angles [see PX-32; R. 986-986A].

Finally, plaintiff's counsel obtained the allowance of the '479 patent in suit upon representing that its novelty lay in the fact that it provided “substantially *triangular* passages small in cross-section and entirely surrounded by the mesh of the screens” [R. 920-922]. Upon the strength of this purported distinction, the Patent Office granted the '479 patent. But it should be remembered that the prior use Farr '480 air cleaner and cooler, which included such *triangular passages*, was unknown to the Patent Office

(although fully known to plaintiff and its present counsel and witnesses) when such argument was presented to the Patent Office.

It will thus be understood from the representations and admissions of plaintiff, its counsel, and its expert witnesses that the novelty, if any, to be attributed to the '479 patent is extremely minute, and that at best the advance in the art was minor in nature. This is confirmed by the prior art in evidence, which is generally reviewed in the next section.

H. The Prior Art—Generally.

Plaintiff freely admits that all of the elements of the claims of the '479 patent in suit are separately old in the art [R. 803]. No contention has been made by plaintiff that the individual elements operate any differently in their asserted combination in the '479 patent than they did in the prior art, and there is no evidence to support such a contention. Indeed, it will be clearly apparent to this Court that all of such elements in fact operate the same way in the patent in suit that they operated in the prior art.

First, while the '479 patent teaches the use of wire screen members, it does not specify the size of the wire mesh. The commercial air filters made by plaintiff under the '479 patent, however, use ordinary fly screen such as is used in house windows. The use of fly screen as a filter media is very old in the art, and this Court can take judicial notice that such an ordinary window screen is an excellent dust collector and must be cleaned at least once each year, and that this has been known since the advent of such window screen. If dust-laden air is passed along or through such a screen, at least some of the dust

hits and sticks to the screen, making it an “impingement type” filter. It should also be noted that no adhesive coating is used on home window screens, yet dust sticks all too well! In any event, plaintiff’s counsel admits that the use of such screen in air filters is old in the art [R. 815].

It was old in the art to coat a dust-collecting surface, such as wire screen, in an air filter with oil, and there is no novelty in such oil coating as is freely admitted by plaintiff [R. 88]. Other coating materials commonly interchangeably employed are various adhesives and water, as is fully taught by the Wood patent [R. 1034], and the Niestle (French) patent [R. 1069], and this was pointed out by Mr. Russell, defendants’ expert [R. 447-448].

It was old in the art to make a filter *identical in construction* with that of the filter of the ’479 patent, except that paper, cardboard, or other impervious material was used instead of wire screen. Such filters are referred to in the evidence as the “Detroit Air Filter” and are exemplified by physical exhibits PX-16, DX-C, and DX-N, which are shown and described in the Kaiser patent [R. 1022] and the Manning patent [R. 1026; 403-405]. Mr. Lyon, plaintiff’s counsel, conceded that if the Detroit Air Filter had been made of fly screen in the prior art, plaintiff would have no case here [R. 815]. Thus, so far as the Detroit Air Filter is concerned, the only difference between its construction and that of the ’479 patent in suit is the use of fly screen in place of cardboard, and

fly screen, of course, was an admittedly old and well-known filtering material.

It was old in the art to make an air filter of identically the same wire screen construction as the '479 patent in suit, except that there was no bend or change of direction in the corrugations. This is the fact as to the Farr '480 device, in commercial use and on sale before any alleged invention of the '479 device, as pointed out hereinafter (p. 43). Abrupt changes of direction in filter passages through air filters, however, was old and well known, as shown by the prior art patents to Henshall, Slauson, Kaiser, Manning, Row (British), Moller (British), and Niestle (French), all as admitted by plaintiff's expert Duncan [PX-32, R. 986-986A]. It was a common expedient to obtain turbulence in the air flow.

Even the "progressive loading" mode of operation of the '479 filter was old in the art, as admitted by Mr. Duncan, plaintiff's expert, the same being fully taught and achieved in the air filters shown in the prior art patents to Henshall, Orem, and Merryweather [PX-32, R. 986-986A].

It is revealing to note that, although Finding of Fact 4 [R. 59] specifies the mode of operation of the Farr '479 filter, this is *no* finding that such mode of operation is *novel* in the filter art. Findings 10, 11, 12 and 13 specifically find that such mode of operation is not found in certain specific prior art patents in evidence, but there is no finding that such mode of operation is not present in the prior art patents to Henshall, Greene, Preble, Orem,

Merryweather, or the Farr '480 device, and plaintiff has specifically admitted that such mode of operation is present in at least the prior art patents to Henshall, Orem, and Merryweather [PX-32, R. 986-986A].

I. Defendants' Accused Device.

The accused Air-Maze air filter is referred to in the evidence as the "P-5" (not to be confused with the "P-5 Obsolete," as to which there is no charge of infringement). It is exemplified by physical exhibit PX-12, and its filter media is exemplified most clearly in physical exhibit PX-6. It is shown and described in the Schaaf patent, DX-00 [R. 1080], issued to defendant Air-Maze [R. 537].

As the Court will immediately note from the physical exhibits, the Air-Maze "P-5" filter media has *no flat sheets* of screen designated 9, shown and described in the '479 patent in suit, nor any equivalent thereof. In the P-5, each of the sheets of fly screen is provided with "Z-shaped" corrugations, and alternate sheets are laid together so that *the corrugations are reversed in direction*. This permits the screen sheets to be stacked without nesting and without any flat intermediate sheets of screen. In it, the only contacts between adjoining sheets of screen are at the crests of the corrugations where they cross [R. 237-238]. This is clearly shown in the sketch DX-J [R. 1066], in which the small circles indicate the points of contact between the crests of corrugations in adjacent sheets of screen, the corrugations in one screen sheet being shown in green and those of the adjoining sheet being shown in red. DX-J also illustrates how the corrugations of adjoining sheets in the P-5 filter are angled in opposite directions.

In the accused P-5 filter, there are no well-defined passageways which are wholly enclosed by wire mesh and which extend from one face to the other face of the filter, as in the '479 patent in suit. In the P-5, the space between adjoining layers of wire screen is entirely open laterally except for the contact points where the corrugations cross and the crests engage each other. The evidence was that there are no passages of triangular cross section in the P-5, the cross section of such openings being of varying and non-uniform cross section [R. 539], whereas in the '479 patent each passage through the filter is triangular in cross section and well defined from front to back.

In operation, the air flow is quite different in the Air-Maze P-5 filter than it is in that of the '479 device as the panels start to clog with dust, and this is a fundamental difference in the way in which they load with dust and operate [R. 555-556]. In the P-5 filter there is no single pathway of uniform cross section between the screen members, as in the '479 filter, the air breaking up into a large number of filaments as shown in DX-J [R. 557]. In physical Exhibit SS, the strings illustrate the various channels the air might take in going through the P-5 [R. 563-564], the individual air streams mixing laterally as well as flowing through the filter [R. 668-669]. Plaintiff's photographs, Exhibits 9 and 14, respectively, graphically illustrate that the distribution of dust throughout the Air-Maze P-5 is much more uniform than in the Farr '479 filter, upon which the experts on both sides agreed [R. 207; 547-549], and Professor Rowley pointed out that this indicates a difference in their mode of operation [R. 558-560].

III.

Specifications of Error in the Findings of Fact of the District Court.

1. Finding 5 [R. 60] is erroneous in finding that prior art air filter panels made of screen wire positioned so that the air was introduced perpendicular to the plane of the wire, and paper air filters as referred to therein, did not have the mode of operation or achieve the advantages of the Farr '479 patent in suit, because unsupported by and contrary to the evidence (see pp. 39 *et seq.*, *infra.*).

2. Finding 6 [R. 60] is erroneous in finding that air filter panels of the Farr '479 patent in suit combine the ability to provide a high efficiency in removing dust from air with a lower pressure drop than previous commercially built filters, which pressure drop did not increase as rapidly as the filter became loaded with dust (see pp. 7-11, *infra.*), and erred in finding that the filter of the '479 patent in suit provided any further advantages of low cost of manufacture or maintenance or permitted ease of cleaning, because unsupported by and contrary to the evidence.

3. Finding 7 [R. 60] is erroneous in finding that the patent in suit had any commercial success or was responsible for the development of the business of the plaintiff, because unsupported by and contrary to the evidence (see p. 38, *infra.*).

4. Finding 8 [R. 61] is erroneous in finding that the air filter of the claims of the patent in suit was not disclosed in any of the prior art or prior uses in evidence, because contrary to the evidence (see pp. 47-54,

infra), and erred in failing to find that such prior art and prior uses disclose substantially the same construction used in substantially the same way to produce substantially the same result (see pp. 47-54, *infra*).

5. Finding 9 [R. 61] is erroneous in finding that the '479 patent in suit does not disclose an aggregation, and in finding that it does disclose a new combination of elements which cooperate to provide any advantage in the cleaning of air or benefits in cost of manufacture, maintenance, or upkeep, because contrary to and unsupported by the evidence (see pp. 27-38, *infra*).

6. Finding 10 [R. 61] is erroneous in finding that the prior art patents referred to therein do not disclose filter panels operating on the principle of impingement of particles on collecting surfaces or do not remove dust by the same mode of operation referred to in Finding 4, or achieve the advantages of the '479 patent in suit, because unsupported by and contrary to the evidence (see pp. 17-19; 28, 31, *infra*).

7. Finding 11 [R. 61] is erroneous in finding that the prior art patents specified therein do not possess the mode of operation referred to in Finding 4 or achieve the advantages of the '479 patent in suit, because unsupported by and contrary to the evidence (see pp. 17-19; 28, 31, *infra*).

8. Finding 12 [R. 62] is erroneous in finding that the prior art patent to St. Cyr does not disclose an air filter panel which operates by the impingement of particles on collecting surfaces, and erred in finding that in the St. Cyr patent the crimps change direction only slowly and do not provide passages which change abruptly in

direction, and erred in finding that the device of the St. Cyr patent is not adapted to perform by the same mode of operation referred to in Finding 4 or achieve the advantages of the device of the '479 patent in suit, because each thereof is unsupported by and contrary to the evidence (see pp. 47-51, *infra*).

9. Finding 13 [R. 62] is erroneous in finding that the French patent to Niestle does not operate by the same mode of operation referred to in Finding 4 or achieve the advantages of the Farr patent in suit, because unsupported by and contrary to the evidence (see pp. 51-54, *infra*).

10. Finding 14 [R. 63] is erroneous in finding that prior to the alleged invention of the '479 patent in suit, the art expended great or any effort or money in scientific study or testing of different air filter panels without the panel of the '479 patent in suit being suggested thereby, because unsupported by and contrary to the evidence (see p. 42, *infra*).

11. Finding 15 [R. 63] is erroneous in finding that the '479 patent in suit had marked or any commercial success, and that the prior art failed to produce an air filter having a mode of operation or achieving the advantages thereof, and finding that claims 4, 5, 7, and 8, or any of them, of the patent in suit define a patentable combination or represent an invention and not mere mechanical skill, because unsupported by and contrary to law and the evidence. (See pp. 27-38, *infra*).

12. Finding 19 [R. 64] is erroneous in finding that defendants' P-5 air filter panels are essentially or basically the same as the air filter panels of the '479 patent in suit, because unsupported by and contrary to the evidence. (See pp. 63, *infra*.)

13. Finding 21 [R. 64] is erroneous in finding that claims 4, 5, 7, and 8, or any of them, of the '479 patent in suit, are not limited to the use of flat screen wire and were not intended by the Patent Office or the patentee to be so limited, because unsupported by and contrary to the evidence. (See pp. 57-62, *infra*.)

14. Finding 22 [R. 65] is erroneous in finding that claims 4, 5, 7, and 8, or any of them, of the '479 patent in suit are not limited and were not intended by the Patent Office or the patentee to be so limited to the use of crimped wire screen, all of which had the angles of the crimp extending in the same direction, because unsupported by and contrary to the law and the evidence. (See pp. 57-62, *infra*.)

15. Finding 23 [R. 65] is erroneous in finding that the filing of the application for the '479 patent in suit did not abandon any of the forms of air filter shown in prior application Serial No. 285,904, and that the file-wrappers of said applications do not contain any abandonment or estoppel such as would prevent the claims in suit from including defendants' P-5 air filter panels, because contrary to the law and unsupported by and contrary to the evidence. (See pp. 57-62, *infra*.)

IV.

Summary of the Argument.

Point 1.—The '479 patent in suit is invalid for lack of invention because it is merely for an assemblage of old elements which operate in substantially the same way to produce the same results as they did in the prior art, with no new, surprising, or unexpected results.

Point 2.—The '479 patent in suit is invalid for lack of invention over the prior art Detroit Air Filter, as no invention was involved in merely substituting wire fly screen for cardboard therein.

Point 3.—The '479 patent in suit is invalid for lack of invention over the prior use Farr '480 air cleaner and cooler, as no invention was involved in merely adding a bend or change of direction to the corrugations thereof.

Point 4.—The '479 patent in suit is invalid for lack of invention over either the prior patents to St. Cyr or Niestle (French).

Point 5.—All the claims of the '479 patent in suit are invalid for failing to comply with 35 United States Code, Section 33, in that the only possible feature of novelty thereof is functionally defined merely in terms of result.

Point 6.—Defendant P-5 filter does not infringe the '479 patent in suit because: (a) the patentee Farr abandoned the P-5 type of construction; and (b), by file-wrapper estoppel, is estopped from construing the claims in suit as infringed by such P-5 filter.

Point 7.—Defendants' P-5 filter does not infringe because it differs substantially in construction from that of the '479 patent in suit.

V.

ARGUMENT.

Point 1. The '479 Patent in Suit Is Invalid for Lack of Invention Because It Is Merely for an Assemblage of Old Elements Which Operate in Substantially the Same Way to Produce the Same Results as They Did in the Prior Art, With No New, Surprising, or Unexpected Results.

All of the elements of each of the claims in suit of the '479 patent are admitted by the plaintiff to be old and well known in the art. Mr. Lyon, plaintiff's counsel, expressly so admitted [R. 803], and this is graphically illustrated in the prior art chart, PX-32 [R. 986-986A] submitted and adopted by plaintiff's expert Duncan. While the District Court found [F. 9, R. 61] that the '479 patent discloses a new combination of "old elements," it failed to find that such old elements "perform any additional or different function in the combination than they perform out of it," as seems to be required by the Supreme Court in *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, at 152.

There was no factual evidence whatever offered by plaintiff to attempt to show that any of the elements of the '479 filter operate any differently in the alleged combination than they did separately in the prior art, nor was there even any expert opinion to such effect. There was no evidence whatever that the bringing together of such old elements in the '479 filter produced any unusual or surprising consequences. The most that has been contended for by the plaintiff is that the '479 patent, as a result of the combination of old elements, produced an air filter which has a relatively high filtering

efficiency combined with a low pressure drop rise during its life. This, we suggest, is not enough to sustain the validity of the '479 patent for a mere combination of old elements. It is our position that if there be *any* "improved" results flowing from such combination of old elements, they differ at best in but slight degree from those of prior air filters. The results, obviously, do not differ in kind.

To establish positively, however, that each of the elements of the '479 patent in suit operates in the asserted combination thereof in the same way that it operated in the prior art, claim 7 in suit, which is representative, is discussed element by element as follows, each of the elements thereof being quoted and italicized.

Claim 7 in suit is directed to:

"An air filtering panel operating on the principle of impingement of particles on a collecting surface,"

All of the prior art in this case is directed to air-filtering devices which operate on the *impingement principle*. Plaintiff's prior art chart PX-32 [R. 986-986A] admits this as to most of the prior art in evidence. As admitted by Mr. Duncan, plaintiff's expert, in impingement type filters, dust particles impinge upon a screen or other collecting surface and stay there, as distinguished from a filter in which the air passes through holes which are smaller than the dust particles so as to strain out the particles [R. 760-761], the latter type of filter not being involved in this action. Obviously, in the '479 filter the dust impinges on and sticks to the wire mesh just as it does in the prior art filters of the impingement type and on ordinary window screen in a house. The District Court, in Finding 10 [R. 61],

specifically found that the filters of the prior patents to Wood, Kirkham, Row, and Moller did not operate “on the principle of impingement of particles on collecting surfaces and do not remove dust by the same mode of operation referred to in Finding 4.” The error in this is obvious, as even plaintiff’s expert Duncan admitted that the Row (British) patent [R. 1051] removes dust on the impingement principle [R. 782], and that the Kirkham (British) patent [R. 1047] operates the same way [R. 764]. Similarly, in both the Wood [R. 1034] and Moller [R. 1058] patents, the dust hits and sticks to solid collecting surfaces coated with oil or other adhesive. So far as *dust removal* is concerned, all of the prior art in evidence operates on the *impingement principle*.

“which panel includes mesh screening members”

As admitted by plaintiff’s prior art chart, PX-32 [R. 986], many of the prior art patents show the use of wire mesh screen. In all of them the screen operates to collect dust by the impingement principle, which is its function in the ’479 filter. For example, in the Merryweather patent [R. 1019] it is plain that dust-laden air strikes the screen members and the dust is removed from the air by impingement just as in the ’479 filter, as was admitted by plaintiff’s counsel to the Patent Office during the prosecution of application for the ’479 patent [R. 919].

“[the members being] constructed and arranged to form passages extending through the panel”

Plaintiffs admit that most of the prior art filters in evidence include such “members” so constructed [PX-32, R. 986], whether the members are wire screen as

shown in the patents to St. Cyr, Merryweather, Orem, Farr '480, Row (British) or Niestle (French), perforated plates as shown in Henshall, or solid plates as shown in Slauson, Kaiser, Manning, Wood, or Moller (British). In every one of the prior art patents (with the exception of the Greene patent) such passages are used to provide air paths through the filter, just as in the '479 patent in suit. For example, in the St. Cyr patent [R. 989], it is plainly stated that the corrugations or passages provide "canals or conduits for the air and vapor" (p. 2, Col. 1, lines 59-60); in the Henshall patent [R. 993] air passages are provided between the herring-bone filtering plates 16, 17, 18, and 19; and similarly in the other prior art references.

"[the passages being] *of relatively large size as compared with the openings in said mesh members,*"

In all of the prior art showing wire mesh or perforated plates forming passages through a filter, the openings in the mesh or plates are small compared with the size of the passages, exactly as claimed. Plaintiff admits this as to most of such prior art [PX-32, R. 986]. It is also true in the Henshall patent and Niestle (French) patent.

"said passages subdividing the panel in both dimensions perpendicular to the general direction of flow of the medium to be filtered"

Again, plaintiff admits that in *eleven* of the *fifteen* prior art patents in evidence, the passages through the filter so subdivide the panel [PX-32, R. 986]. There

is nothing in the specification of the '479 patent or in the evidence to show any particular result of such subdivision. In fact, it is not even mentioned in the '479 specification. Obviously, however, whatever advantage, if any, derived from it in the '479 filter is similarly derived in the prior art filters having the same construction.

“and [said passages] being so constructed and arranged that as the mesh of the members becomes progressively clogged the medium to be filtered may flow through such passages and encounter unclogged openings in said mesh members,”

This clause of claim 7 is purely functional as to the result obtained, and adds nothing to the structure attempted to be defined by the claim. In any event, plaintiff admits that the passages in some of the filters of the prior art operate in exactly the same way, making this admission as to the patents to Henshall, Orem, and Merryweather [PX-32, R. 986].

This method of operation, so admitted by the plaintiff to be old in the art, is the only “new mode of operation” which the plaintiff in the same breath claims for the '479 filter [Mr. Lyon, R. 814]. It is the “progressive loading” extensively referred to in the evidence.

Mr. Duncan, plaintiff's expert, additionally admitted that the Detroit Air Filter (of the Kaiser and Manning patents) had “progressive loading” [R. 794], and that the filter of the St. Cyr patent may have some “progressive loading” [R. 793].

It is thus apparent, from such admissions by plaintiff's counsel and expert, that the passages of the prior art filters are constructed and arranged to give the same mode of operation specifically claimed for them in the claims of the '479 patent in suit, and that this is the only mode of operation asserted to be new in the filter of the patent in suit.

“said passages changing in direction.”

The passages of the '479 filter have a bend and change in direction, by reason of their herringbone configuration, and the purpose thereof in the '479 patent is to insure “that the air flowing through the panels will have its dust particles thoroughly impinged against the screen wire of the members 4 and thereby deposit the dust load” [R. 840, Col. 2, lines 36-43]. In other words, the purpose of such “change in direction” is to insure turbulence of the air passing through the filter.

Plaintiff admits that filter passages having such change in direction are old in the art in the patents to Henshall, Slauson, Kaiser, Manning, Row (British), Moller (British), and Niestle (French) [PX-32, R. 986]. That the bends operate to create such turbulence of air flow in the prior art is, we believe, obvious. However, that it is the fact is perfectly clear from the prior art patents themselves. *See*: the Preble patent [R. 1002, p. 1, Col. 2, lines 74-86]; the Kaiser patent [R. 1022, p. 2, Col. 1, lines 23-29]; the Manning patent [R. 1026, p. 1, Col. 2, lines 46-52].

The other claims 4, 5, and 8 of the '479 patent in suit likewise, by plaintiff's similar admissions, contain similar elements that are all old in the prior art. The only

other element of such remaining claims which is not discussed above is that found in claim 4, as follows:

“members extending in the general direction of the intended flow of the medium to be filtered,”

Plaintiff admits that *twelve* of the *fifteen* prior art filters have such a construction [PX-32, R. 986], and the '479 patent in suit states that “arranging the screens in the filter panel in such a manner as to provide paths for air flow through the filter panel *along lines parallel to the plane or planes of the screens employed*, high filtering efficiency can be effected while at the same time there is obtained a lower pressure drop less affected by increased dust load.” [R. 840, Col. 1, lines 32-39.] This operating characteristic of having the air flow *along lines parallel to the screens* was characterized by plaintiff in the court below as the “unique operating characteristic” of the '479 filter [R. 814].

Obviously, in the *fifteen* prior art filters in evidence which the plaintiff admits have filter members extending in the general direction of the air flow, the air flows along lines generally parallel to the filter members just as it does in the '479 filter. Plaintiff's expert Duncan admitted that in the St. Cyr patent the air flow is roughly parallel to the layers of wire screen [R. 775]; admitted that in the Henshall filter the flow was partly through the holes and partly along the passages and the surface of the perforated filter members [R. 743]; admitted that in the Preble patent the flow was generally parallel to the filtering members [R. 748-749]; and admitted that in the Orem filter the air flows along parallel to the wire screens [R. 751]. Defendants' expert Russell testified without contradiction that similarly there was such a flow parallel to the filter members in the patents to Farr

480 [R. 414], St. Cyr [R. 372], Henshall [R. 373-374], Slauson [R. 392], Orem [R. 395], Merryweather [R. 401-402], Kirkham (British) [R. 423-424], Row (British) R. 432-433], Moller (British) R. 453], and Niestle (French) [R. 467-468].

It is thus apparent that every element of the claims of the '479 patent in suit is not only old in the prior art in evidence but, in addition, every element operated exactly the same in the prior art filters as it does in the filter of the '479 patent.

So much for the facts. The law is plain to the effect that a patent for a new combination of old elements is invalid unless the elements operate differently in the combination than they did in the prior art. The rule has been aptly stated as follows:

“Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly.”

Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147 at 152.

Not only must the old elements operate differently in the combination than they did separately in the art, but there must be some unusual or surprising consequences resulting from the alleged combination to sustain the patent. This was recently stated and applied by this Court in *Photochart v. Photo Patrol, Inc.*, 189 F. 2d 625 (1951), as follows:

“ . . . There is no exact standard by which a court may determine when a combination of old elements constitutes invention and when it is within the mechanical skill of one working in the art. The most recent opinion of the Supreme Court on combination patents expresses the view that, ‘courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements.’ *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147. The test to be applied to such patents is that *the combination must perform some new or different function—one that has unusual or surprising consequences*. It is our view that the patent in suit fails to meet this severe test and does not constitute invention. The most that can be said for the patent in suit is that it rearranges the elements of the slit camera in such a manner that in the performance of their respective functions a higher degree of accuracy is obtained”

The rule was stated and applied by this Court in the very recent case of *Himes v. Chadwick*, F. 2d, 95 U. S. P. Q. 59 (C. A. 9th, 1952).

The rule was also recently stated and applied by the Court of Appeals for the Sixth Circuit in *United Special-*

ties Co. v. Industrial Wire Cloth Products Corp., 186 F. 2d 426 (1951), in which it held invalid three patents on *air filters*. There, the patent owner contended that its patented air filter construction increased air-filtering efficiency to over 95% and provided an economical device, but the Court disposed of this argument on the ground that, at best, the alleged new results differed merely in *degree*, which was not patentable. Such decision is obviously directly relevant to the facts in the present case.

Other recent decisions applying the strict test of invention in holding invalid patents to mere combinations of old elements are the following: *Vapor Blast Mfg. Co. v. Pangburn Corp.*, 186 F. 2d 230 (C. A. 4th, 1950); *Montgomery Ward & Co. v. Buer*, 186 F. 2d 614 (C. A. 6th, 1951); *Paramount Industries v. Solar Products Corp.* 186 F. 2d 999 (C. A. 2d, 1951); *General Bronze Corp. v. Cupples Products Corp.*, 189 F. 2d 154 (C. A. 8th, 1951); *Schreyer v. Casco Products Corp.*, 190 F. 2d 921 (C. A. 2d 1951); *F. C. Russell Co. v. Comfort Equipment Corp.*, 194 F. 2d 592 (C. A. 7th, 1952); *Hutchinson Mfg. Co. v. Mayrath*, 192 F. 2d 110 (C. A. 10th, 1951); *Ingersoll-Rand Co. v. Black & Decker Mfg. Co.*, 192 F. 2d 270 (C. A. 4th, 1951); *Penn. Crusher Co. v. Bethlehem Steel Co.*, 193 F. 2d 445 (C. A. 3rd, 1951).

As to results obtained from such alleged combination of old elements in the '479 patent, plaintiff contended in the Court below, and will undoubtedly contend here, that such combination resulted in an air filter having higher efficiency combined with a lower pressure drop rise than

had theretofore been achieved in air filters of this general type. Assuming, without admitting, that such contention is true (see pp. 7-11 above), any slight increase of efficiency or reduction in pressure drop rise, or both, would alter the results in degree only and not in kind.

Mr. Duncan, plaintiff's expert, testified that as to filters of the '479 type, they should be taken out of service and cleaned when the total dust load thereon reached between 500 and 600 grams of dust [R. 183-184], which is the intended life of the filter operation. The operation up to a 600-gram dust load, or for the duration of the particular test, whichever occurred first, is shown for the various air filters in evidence in chart form in Plate I annexed at the back of this brief. It provides a ready means of comparison of the various filters. Of the filters tested, shown in Plate I, the Air-Maze Type B and the Detroit Air Filter were in wide commercial use long prior to the '479 filter in suit, and are still made and sold in large quantities. They are remarkably like the Farr '479 filter in both filtering efficiency and in pressure drop rise during their normal life. Any differences in performances are merely matters of degree.

It is also to be noted that the witnesses were unanimous in the fact that a pressure drop rise of up to 0.5 inch of water is acceptable under standards set up by the industry for heating and ventilating applications [Duncan, R. 145, 146; Watterson, R. 338-339], and plaintiff's expert Duncan admitted that a pressure drop rise up to 0.5 inch would be perfectly satisfactory for most installations [R. 184-185]. As shown by Plate I, the pressure drop

rise of all of the filters tested, including the prior art, was well below the maximum permitted by the standards of the industry.

The District Court, in Finding 7 [R. 60], placed heavy reliance upon “commercial success” of the Farr '479 filter in support of its finding of invention. Such reliance indicates the doubt of the District Court as to invention, as otherwise commercial success would be irrelevant. Yet there is no evidence in this case that the commercial success of the Farr filter was due to any novelty in filter construction or to any alleged differences in results. No disinterested witness was called by plaintiff on this issue, although obviously if such commercial success could properly be attributed to such alleged novelty in construction or results available fact witnesses should have been plentiful.

It is therefore submitted that the '479 patent covers merely an aggregation of old elements which operate in substantially the same way to produce substantially the same result as they did in the art, and that no new, surprising, or unusual results can be attributed to the '479 filter by the mere bringing of such old elements together therein. Upon the law and the facts, the District Court's Finding 9 [R. 61] to the contrary is clearly erroneous. Obviously, a primary error of the District Court here was in using a standard of invention “less exacting than that required where a combination is made up entirely of old components” (*See: Great A. & P. Tea Co. Case, supra*, at p. 154.) All of the claims should be held invalid.

Point 2. The '479 Patent in Suit Is Invalid for Lack of Invention Over the Prior Art Detroit Air Filter, as No Invention Was Involved in Merely Substituting Wire Fly Screen for Cardboard Therein.

Plaintiff's counsel conceded in the Court below that if the Detroit Air Filter had been made of wire fly screen in the prior art, instead of paper, plaintiff would have no case here [R. 1134]. This was confirmed by the witness Brown, who during the trial actually made and tested a Detroit Air Filter made of fly screen and found that the filtering efficiency started at 83% and rose to 88%, with a pressure drop starting at 0.095 inch of water and rising to 0.14 inch [R. 692-694], which is almost identical with each of the results obtained by Mr. Duncan in his tests of the Farr '479 filter (see Plate I, *infra*.)

The question here presented, therefore, is whether, in the '479 patent in suit, it amounted to invention to make the Detroit Air Filter of wire fly screen instead of paper or cardboard.

The paper Detroit Air Filter is exemplified by physical exhibits PX-16, DX-C, and DX-N, and is shown and described in the Kaiser patent, DX-B, Tab 8 [R. 403-404]. Such filters have been made and sold commercially since about 1932, and are still being sold in quantity by defendant Air-Maze [R. 191, 330], and are very satisfactory [R. 330]. They are made in the same dimensions as the Farr '479 filter and are used interchangeably with the Farr filter in ventilating systems [R. 191-192]. The Detroit Air Filter is a "throw-away" type which the

user merely throws away when it gets dirty, instead of cleaning it [R. 192], and costs only about \$1.25 as compared with a cost of \$7.00 or \$8.00 for the same sized Farr '479 filter [R. 213-214].

The tests in evidence of the commercial Detroit Air Filter made of cardboard, as shown in Plate I at the end of this brief, plainly establish that it has substantially the same performance characteristics as to both efficiency and pressure drop as the Farr '479 filter. When made of fly screen, the results are about the same, and do not differ in kind.

Assuming that a slight increase in filtering efficiency and a slight reduction in pressure drop rise are to be obtained by making the Detroit Air Filter of fly screen instead of cardboard, as is confirmed by Mr. Brown's test of such a filter, referred to above, we submit that such a mere substitution of materials did not amount to invention in the Farr '479 patent.

Wire fly screen was old and commonly used in air filters long prior to the '479 patent in suit, as admitted by plaintiff. Air will obviously pass through it, to produce increased turbulence if that is desired, and such turbulence obviously will increase filtering efficiency in an impingement type filter, as there is more chance of the dust contacting a solid dust-collecting surface. In making such substitution of material, all that Farr did in the '479 patent was to take advantage of the known and obvious characteristics of fly screen.

The applicant Farr and plaintiff's present counsel represented to the Patent Office that by reason of such sub-

stitution of materials, the Farr filter obtained “progressive loading,” where part of the air goes through the mesh and part along the mesh, which, they represented, was a wholly new result in the air filter art [R. 910-912]. Plaintiff *now* concedes, however, that the “progressive loading” with the use of wire screen of the ’479 filter is disclosed in the prior art patent to Orem [PX-32, R. 986]. The Orem patent was not considered by the Patent Office in connection with the application for the ’479 patent in suit, and, we suggest, had it been and had plaintiff’s counsel then conceded that Orem teaches such progressive loading with wire screen, the Patent Office never would have granted the ’479 patent. Moreover, the Patent Office had no knowledge of the Farr prior use ’480 air cleaner and cooler, which taught the use of fly screen in a filter device of substantially the same construction as the Detroit Air Filters of the Kaiser and Manning patents. Such facts and concessions before this Court were not before the Patent Office.

Under the law, the mere substitution of one well-known material for another, to take advantage of the known characteristics of the material substituted, and without any new result different in kind, is not invention. The rule was stated and applied by this Court in *United States Appliance Corp. v. Beauty Shop Supply Co., Inc.*, 121 F. 2d 149 (1941), in which it stated at page 150:

“A substitution of one material with known characteristics for another material does not rise to the dignity of invention.”

To the same effect, *see: Heath v. Frankel*, 153 F. 2d 369 (C. C. A. 9th, 1946); *Kasser Egg Process Co. v. Poultry Producers*, 50 F. 2d 141 (C. C. A. 9th, 1931).

It is therefore submitted that the claims in suit of the '479 patent are invalid because the mere substitution of wire fly screen for cardboard in the Detroit Air Filter does not amount to invention.

The District Court was under the misconception that the art labored long and hard to find a filter such as that of the '479 patent in suit (See Finding 14 [R. 63], and Memo. Op. [R. 821-822]). In this conclusion, the trial Court relied upon a filter study made by the Association of American Railroads in 1938, the results of which are reported in PX-27. This report PX-27 was mere hearsay and was erroneously admitted into evidence over defendants' objection [R. 659-660]. In any event, it does not support in any way the trial Court's conclusion. The report, as is clearly evident from its contents, was merely a test comparison of various air filters then on the market and "suitable for passenger car service" [See p. 1 of PX-27], and its obvious purpose was merely to provide the railroads with test data upon which they could select filters for their respective uses. The report plainly was not an effort "to find what apparently the plaintiff put together here in a combination," as stated by the District Court [R. 822]. Such importance, erroneously accorded by the District Court to PX-27, illustrates the obvious error that runs throughout the entire decision of the District Court.

Point 3. The '479 Patent in Suit Is Invalid for Lack of Invention Over the Prior Use Farr '480 Air Cleaner and Cooler, as No Invention Was Involved in Merely Adding a Bend or Change of Direction to the Corrugations Thereof.

As pointed out above (p. 12), the air filter and air conditioner shown in the Farr '480 patent [R. 1031] was sold and in commercial use long prior to any date of invention claimed by plaintiff for the '479 patent in suit.

The Farr '480 device was identical in the construction of the filter media with that of the Farr '479 patent in suit, except that the corrugations in the crimped screen go straight through on a diagonal and without any change of direction, which was conceded by plaintiff's witnesses [R. 306-309]. Such "change of direction" in the passages is asserted by plaintiff to be an essential element of the '479 patent in suit, and was even asserted by plaintiff to be the "invention" (see p. 11, *supra*.) The '480 filter media is shown in a photograph PX-26 in evidence [R. 975].

The filter media of the Farr '480 device was substantially disclosed in the abandoned Farr application Serial No. 285,904, PX-1B [R. 941-952], and is illustrated in the drawing thereof in Figs. 5, 6 and 7, and such abandoned application plainly indicates that such construction (without any bend or change in direction of the corrugations) was the *full equivalent* and alternative to the form shown in Figs. 9 and 10 thereof in which there was a bend or change of direction in the corrugations and which,

plaintiff asserts, is the form carried over into the '479 patent [R.]. Thus, it is plain that the applicant Farr considered the filter media of the '480 device, without any bend in the corrugations, to be the full equivalent of the filter media of the '479 patent having such a bend.

As stated in the '479 patent, the purpose of the "bend" is "to provide further assurance that the air flowing through the panels will have its dust particles thoroughly impinged against the screen wire of the members 4 and thereby deposit the dust load" [R. 840, Col. 2, lines 36-43]. Such bends or sharp changes in direction were old and well known in the art, where they served the same purpose (see pp. 19, 32, above) and we suggest that no invention was involved in the '479 patent in suit in adding such a "bend" to the corrugations of the prior use '480 device.

The '480 prior use device was not, of course, before the Patent Office during its consideration of the application for the '479 patent here in suit, and it did not have the benefit of the evidence before this Court as to the '480 device. If it had, we suggest, it would have made short shrift of plaintiff's claim to invention, since the only change in the filter media was the change of direction of the corrugations added in the '479 patent.

The '480 device was an air filter designed and adapted to remove dust from the air. The '480 patent states: "This invention relates to an air purifier or cleaner, *the function of which is to remove dust or impurities from air*" [R. 1032, Col. 1, lines 1-3]. That it so operated, is plain from plaintiff's sales literature, in which it is stated that "the rotor *is an excellent air filter and collects dirt*" [R. 1144], and was admitted to be a *good air filter* by Mr. R. S. Farr [R. 1095-1096; 1116].

In actual commercial use, the '480 device was used as a humidifier or air conditioner, and the rotor was coated with water for this purpose, instead of oil, although they are equivalents (see p. 18, above). The dust striking the water-coated screen would stick thereto and thus be removed from the air, and Mr. Duncan finally reluctantly admitted on cross-examination that the '480 device would collect dust on the "impingement principle" [R. 758-761]. By rotating the rotor through a water bath, the rotor was kept constantly wet and collected dust was intermittently washed off by the bath.

The plaintiff attempted to avoid the pertinent consequences of the '480 device by contending that since the dust is frequently washed out and is not allowed to collect therein, the mode of operation is different from that of the '479 filter in which the dust is allowed to collect and is only washed out at infrequent intervals. The District Court adopted this view [R. 819], and entered Finding 10 [R. 61] to this effect. The obvious error in this is that the '479 patent in suit is not concerned with the manner in which its filter is *cleaned* of dust, and does not mention this. The only concern of the '479 patent is the *removal of dust from the air*. As will be apparent, the method of operation of the '479 and '480 devices is substantially identical so far as such *dust removal* is concerned. Mr. Russell, defendants' expert, pointed this out in detail [R. 414-415]. The '480 patent makes it very plain that part of the air goes through the mesh of the wire screen and part goes along the passages formed by the corrugations [R. 1033, Col. 1, line 69, to Col. 2, line 15], which is exactly the same air action that takes place in the '479 filter.

The '480 device, obviously, has substantially the same structure and operates in substantially the same way as

the '479 to remove dust from air, and was actually so operated. In addition, Mr. Duncan conceded that if one wanted to use the '480 device simply as an air filter, and did not care about any humidifying effect, *it would be an obvious expedient and logical thing simply to dip the '480 rotor in oil, let it drain, and then put it back in place to act as a filter, and if so used it would catch dust* [R. 786]. This would simply be an obvious alternative use of the '480 device, and it was obvious to the applicant Farr, as his son R. S. Farr admits that *it was the success of the '480 humidifier in removing dust that suggested building the '479 filter as a simple dust filter using the same principle* [R. 1096], and the same thing was admitted by his other son M. S. Farr [R. 293].

Since the only difference between the '479 patented filter media and the '480 device was the "bend" in the corrugations to create added air turbulence, and since such "bends" for the identical purpose were old in the prior filter art, and since the '480 device was actually used as a dust filter and made an "excellent filter" in removing dust, we submit that no invention was involved in merely adding the "bends" in the corrugations and using oil instead of water as the dust-collecting agent. Neither oil nor water is an element of the claims in suit. We suggest that such changes would be obvious to one skilled in the art and were, in fact, obvious to the patentee Farr when he designed the '479 filter. We submit that Finding 10 [R. 61] is clearly erroneous, and that the claims in suit of the '479 patent are clearly invalid.

Point 4. The '479 Patent in Suit Is Invalid for Lack of Invention Over Either the Prior Patents to St. Cyr or Niestle (French).

(a) The St. Cyr Patent.

The District Court confessed to having more trouble with the St. Cyr prior art patent [DX-B, R. 989] than any of the others, and, in its Memorandum Opinion, the only structural distinction it could point to was that although St. Cyr discloses a change in direction in its passages or corrugations, such change was not "abrupt" as in the '479 patent in suit [R. 819-820]. The Opinion also states as to St. Cyr: "I do not see how it could be adapted and perform the same function as the plaintiff's patent in suit here" [R. 820]. The District Court then found [F. 12, R. 62] that St. Cyr does not show an air filter panel operating on the "impingement" principle, and that it is not "adapted to perform by the same mode of operation referred to in Finding 4" (which is "progressive loading"). Such conclusions and opinions are clearly erroneous, as they are entirely contrary to the evidence, as will be shown.

That the St. Cyr patent discloses a filter or analogous device is *res judicata* between the parties to this action. In an earlier action, *Air-Maze Corp. v. Temperatair, Inc., and the Farr Co.*, decided in the District Court for the Southern District of California in 1943, in which the defendant (the plaintiff in the present case) prevailed as to a charge of infringement by Air-Maze on the Greene filter patent No. 1,566,088 [DX-B, R. 997], the disclosure

and pertinency of the St. Cyr patent were issues and in its findings of fact in that case [PX-17, R. 957-961], the District Court found as follows:

“III. It is old in *this* and *analogous* arts to pass the air or gas parallel to the screens, as for example in *Saint Cyr*, 1,118,237; *Row* (British) 13,222. . . .”

“VIII. It is old in *this* and *analogous* arts to use corrugated screens to space layers of foraminous materials *to form a filter as shown in the patents to . . . Saint Cyr* 1,118,237. . . .”

The foregoing is a prior judicial determination between the parties to this action that the St. Cyr patent does disclose a filter and is in an analogous art.

The St. Cyr construction is illustrated by physical exhibit DX-V, and includes alternate flat and corrugated wire screens, the corrugations (as shown in Fig. 5 thereof) being at an angle with the edge of the screen so that when rolled up they will be helical in form [R. 364]. There is no question in the evidence that the passages of St. Cyr “change in direction,” and the District Court so stated in its Memorandum Opinion [R. 820] and so found [F. 12, R. 62], indicating that the only distinguishing structural feature is that they do not change “abruptly” in direction as in the '479 device. Claims 4, 5 and 7 of the '479 patent in suit are not limited to an “abrupt” change in direction, although claim 8 is so limited. Consequently, unless “abruptly” is read into claims 4, 5 and 7 in suit they read directly upon the St. Cyr patent disclosure. Actually, in the St. Cyr device [see DX-V] the exit end of each corrugation is displaced about 180° from the inlet end thereof, which would appear to us to be an “abrupt” change in direction. In the Farr '479 patent,

the change in direction is only about 60° ! We therefore submit that every structural element of the claims of the '479 patent here in suit is found in the St. Cyr patent, which shows the error in the District Court's finding to the contrary. In addition, we submit that no invention would be involved in making the change of direction of the St. Cyr passages more or less "abrupt," in view of the many other prior art patents showing passages having abrupt changes of direction identical with that of the '479 patent in suit (*e. g.*, Henshall [R. 993], Slauson [R. 1008], Kaiser [R. 1022], Manning [R. 1026], etc.).

The second error that the District Court fell into with regard to the St. Cyr patent was in holding that its device *could not* be adapted to perform the same function as the '479 patent in suit. The error in this will be obvious from admissions in the testimony of Mr. Duncan, plaintiff's expert, discussed as follows.

Mr. Duncan, plaintiff's expert, conceded that *there is considerable similarity between the Farr '479 filter and the St. Cyr device* [R. 776], that the St. Cyr device would act as a filter and would collect particles of dirt [R. 775], that the "wire gauze" of the St. Cyr patent may be and commonly is used for dust filtering [R. 778], that the filtering action of such "wire gauze" would be substantially the same as any other screen members [R. 779], and that in St. Cyr the purpose of the angle of the "screen" corrugations is to assure a change in direction of the air flow through the device and will give better "impingement" of the dust particles on the "screen" to prevent them from going straight through without having an opportunity to impinge on a "screen" [R. 777], and admitted that some sort of light "progressive loading"

would take place [R. 793]. Thus, the operation of the St. Cyr device in the removal of dust from air would be substantially similar to that asserted for the '479 filter here in suit, which was additionally pointed out in detail by defendants' expert Russell [R. 366-370]. Finally, Mr. Duncan admitted that if one desired to have a combined flow either along the passages or through the mesh of the screen of St. Cyr, it would be easy to select the right weight oil to use to prevent clogging of the screen [R. 789-793].

The St. Cyr device was obviously intended to be used in the air intake of the carburetor of an internal combustion engine, such as an automobile. The Farr '479 filters are likewise used on the air intakes of Diesel railroad engines and internal combustion engines and carburetors therefor [R. 278-279]. As so used, they will both remove dust from the air, and in exactly the same manner. Since the claims of the '479 patent in suit read directly upon the St. Cyr device, and since they operate in the same manner, we submit that the '479 patent in suit is wholly anticipated by and invalid over the St. Cyr patent. We suggest that, although the St. Cyr patent in fact shows an air filter which will naturally remove dust from the air, even if it did not do so, no invention was or could be involved as a matter of law in merely adapting it to such a use. As pointed out by this Court in *Bingham Pump Co. v. Edwards*, 118 F. 2d 338 (1941):

“. . . It is clear that Appel did not conceive of the use of his device as appellee conceives his. However, if Appel's device can be used for the same purpose, it is immaterial whether he conceived of that use. *Daily v. Lipman, Wolfe & Co.*, 9 Cir., 88 F. 2d 362, 364, and authorities cited. Therefore,

the fact that Appel did not know that his device could be used for the same purpose as appellee's device does not preclude the defense of anticipation.

“There remains the question as to whether Appel's device does anticipate appellee's device. The differences between the two devices, as stated above and as related by witness McDougall, are in the form or shape of such devices. Are the changes in Appel's device made by appellee sufficient to impart invention to appellee's device? We think not. The rule on that point is an aged one, and is stated in *Smith v. Nichols*, 21 Wall. 112, 88 U. S. 112, 119, 22 L. Ed. 566, as follows: ‘* * * But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. * * *’ . . .

“Here, the most that can be said for appellee's device is that appellee extended the application of Appel's device, and changed the form thereof. The two devices do the same thing, *i. e.*, prevent wear of the housing. They do it in the same way, *i. e.*, by causing the wear to be absorbed by the liner instead of the housing. Are substantially the same means used? We think they are. . . .”

We submit that the '479 patent in suit is entirely anticipated by, and lacking in invention over, the St. Cyr patent.

(b) The Niestle (French) Patent.

The Niestle (French) patent [R. 1062, 1069] shows an air filter composed of wire mesh members which form zigzag passages through the filter conforming to the pas-

sages of defendants' accused P-5 filter [R. 798]. Its construction is illustrated by physical exhibit DX-DD [R. 795-796]. The passages subdivide the filter panel in both dimensions perpendicular to the general direction of the flow of air through the filter, just as in the '479 patent in suit [R. 463-464]. It contains every element of the claims of the '479 patent in suit (*see* claims 7 and 8, in particular).

The Niestle patent states that the opening in the wire mesh *may* be small enough so that the oil in which the filter is dipped will completely fill such openings to form "a continuous, thick film of oil, favoring the deposition of the dust suspended in the gas" [R. 1073, line 5]. It nowhere states that the opening *must* be that small. Even if all of the mesh openings were completely filled with oil, the Niestle filter would obviously have the same sort of "progressive loading" that plaintiff's expert Duncan admits would be found in the Detroit Air Filter (*see* p. 40-41, *supra*).

The District Court interpreted the Niestle patent as *necessarily requiring* that the openings would fill with oil to prevent air from flowing through the mesh of the screen [Mem. Op., R. 819; F. 11, R. 62]. While we suggest that this is erroneous as unsupported by the disclosure of the Niestle patent, we believe it is immaterial, for, obviously, the District Court wholly failed to consider whether any invention would be involved in selecting a proper size mesh and oil for the Niestle filter to permit the "progressive loading" of the '479 patent.

The '479 patent in suit wholly fails to specify the size of the mesh openings in its screen members or the kind of oil in which it is to be dipped. Mr. Duncan, however, testified that this could readily be determined by anyone skilled in the art [R. 252]. As to the St. Cyr patent, Mr. Duncan likewise testified that anyone skilled in the art could readily select the proper-sized mesh and the proper oil to permit part of the air to go through the mesh and part along the passages [R. 791-792]. By the same token, we say, anyone skilled in the art could readily select the proper-sized mesh openings and the proper oil for the Niestle filter to provide the dual air flow of the '479 patent in suit. This is particularly true, we suggest, in view of the fact that such mode of operation is taught by the prior art patents to Henshall, Orem, and Merryweather, as admitted by plaintiff [PX-32, R. 986].

A sample filter, DX-LL, conforming to the Niestle patent [R. 507-508], was made and was tested by Mr. Rowley with ordinary conventional filter oil. The test results are graphically presented in the chart, DX-MM, which showed results comparable with the Farr '479 filter here in suit (see Plate I, *infra*) and indicated that the Niestle device would be a good air filter [R. 513-515]. The physical exhibit, DX-LL, plainly shows a heavy deposition of dust on the inlet portions of the passages and almost none on the outlet portions of the passages, as the Court can readily see by examination of the exhibit, and plainly establishes "progressive loading" for the Niestle filter. Also, Mr. Brown made and tested a similar

sample of the Niestle filter (DX-YY) made of ordinary 14-mesh fly screen and with conventional filter oil, and the results of this test are also graphically shown in Plate I at the end of this brief, again showing filter performance characteristics directly comparable with that of the Farr '479 filter.

Furthermore, the District Court overlooked the fact that the Niestle patent plainly teaches that its filter may be dipped before use in either *oil* or *water* [R. 1070, line 11; 1072, line 2]. If dipped in *water* and then exposed to the very high air velocity of *1200 cubic feet per minute* (the rated velocity for the Farr '479 filter), can there be any doubt that the air would blow the water out of the mesh and would then go partly through the mesh and partly along the passages, exactly as in the Farr '479 filter in suit? We suggest that if so used *as clearly taught* by the Niestle patent, the Niestle filter would produce exactly the same results as that of the filter of the '479 patent in suit.

We therefore submit that all of the claims of the '479 patent in suit are directly anticipated by and invalid over the Niestle (French) patent, but that in any event no invention would be involved in merely selecting an appropriate-sized mesh screen and a proper consistency of oil to make the Niestle filter operate in substantially the same way as that of the '479 patent in suit to produce substantially the same result.

Point 5. All of the Claims of the '479 Patent in Suit Are Invalid for Failing to Comply With 35 United States Code, Section 33, in That the Only Possible Feature of Novelty Thereof Is Functionally Defined Merely in Terms of Result.

Every element (or their equivalent) of each of the claims in suit is found in the prior art patents to Henshall [R. 993], Orem [R. 1014], and Row (British) [R. 1051], with the exception of the functional phrase: "said members being constructed and arranged so as to effect a multiple subdivision of the panel in both dimensions perpendicular to the general direction of the flow of the medium to be filtered, thereby forming passages extending through said filter the walls of which passages are composed of such mesh members" (*e. g.*, claim 4 in suit).

The Henshall patent [R. 993] shows the use of perforated plates instead of wire fly screen, but the uncontroverted evidence is that if made of fly screen it would operate substantially the same and the only advantage of using screen would be that the screen would be somewhat cheaper [R. 377-378]. Wire screen and perforated plates are therefore full equivalents. The Henshall patent, therefore, has every element of the claims in suit except the functional "constructed and arranged" clause quoted above.

Mr. Duncan attempted to distinguish the Orem patent from the '479 construction in only two respects: (a) a lack of passages (plural), although he admitted it had one such passage and operated in the same way as to "progressive loading" as the '479 patent in suit [PX-

32, R. 986]; and [R. 751-752]; and (b) it lacked the “constructed and arranged” clause quoted above. We suggest that there is no inventive difference between *one* such passage and a plurality, since they operate the same in principle, and that the only possible novelty in '479 over Orem is in the “constructed and arranged” clause.

The Row (British) patent [R. 1051] also shows every element of the '479 claims except the “constructed and arranged” clause. Plaintiff's expert Duncan admitted that it operates the same as the '480 device in the removal of dust from the air [R. 762-764], and we have shown above (p. 45) that this is by the impingement principle, the same as that of the '479 patent in suit and that there would be progressive loading. All of the other structural elements of the '479 claims, with the exception of the “constructed and arranged” clause are admitted by the plaintiff to be present in Row [PX-32, R. 986].

Since the only possible novelty of the '479 claims is stated in functional language merely setting forth the result to be attained, all of such claims are invalid as failing to comply with 35 United States Code, Section 33. (See: *General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364; *United Carbon Co. v. Binney & Smith Co.*, 317 U. S. 228.)

Directly in point is the recent case of *Parker Appliance Co. v. Irvin W. Masters, Inc.*, 94 Fed Supp. 72 (D. C. Cal. 1950), fully affirmed by this Court at 193 F. 2d 180 (1951). In that case, the claims in suit contained the language “so shaped,” followed by a statement of results (just as the '479 claims here in suit state “constructed and arranged” followed by a statement of re-

sults). The claims were held invalid as failing to comply with 35 United States Code, Section 33, and this Court affirmed the judgment for the same reasons. Messrs. Lyon & Lyon were similarly for the patent in suit in that case. We suggest that the decision in the *Parker* case, *supra*, is determinative of the issue here, and that under its authority the '479 claims should be similarly held invalid.

Point 6. Defendants' P-5 Filter Does Not Infringe the '479 Patent in Suit Because: (a) the Patentee Farr Abandoned the P-5 Type of Construction; and (b), by File-wrapper Estoppel, Is Estopped From Construing the Claims in Suit as Infringed by Such P-5 Filter.

(a) Abandonment.

The original and abandoned Farr application, Serial No. 285,904 [PX 1B, R. 941-952], disclosed, in Figs. 1 to 3, thereof, Farr's originally "preferred" form of air filter, in which there were *no flat screens*, all of the screens being crimped to provide diagonal corrugations. In such form, the screens were placed so that the corrugations of adjoining screens were *oppositely disposed*, as plainly shown in Fig. 3 of the drawing. This was admitted by plaintiff in the Court below [R.]. In this originally "preferred" Farr form, adjacent screens were in direct engagement where the crests of the oppositely directed corrugations crossed. Such a construction was specifically claimed by claim 6 of such abandoned application, as follows:

"(6) In a filter, a series of laminated, intersticed metal strips deformed to have convolutions which extend there across at an angle of less than 90 de-

grees with respect to the front edge thereof, said strips being laid with said convolutions in *diagonally opposite directions whereby the crests of each convolution in a single strip is brought into contact with the crests of each convolution of the next adjacent strip* to form unrestricted diagonally extending passage-ways therethrough, whereby the direction of flow of a current of air passing through said filter is changed and matter borne upon said current of air is flung by centrifugal force into the interstices of said filter, and a coating of adhesive material on the walls of said interstices to entrap and hold said matter.”

Plaintiff admits that Fig. 3 of the drawing of the abandoned Farr application is identical with the Air-Maze “P-5 Obsolete,” which is not here charged to infringe any claim of the '479 patent in suit. It is also identical with the defendants' accused P-5 in that: (a) there are no flat screens; (b) the corrugations of adjoining screen members are disposed in opposite directions; and (c) adjacent crimped screen members are in actual engagement where the crests of the corrugations cross. Claim 6, quoted above, is very specific to such features of Figs. 1 to 3, and reads directly upon defendants' accused P-5 filter.

Plaintiff further admitted below that, although the abandoned Farr application disclosed a number of forms of the alleged Farr invention, the only form carried over into the application for the '479 patent in suit was that shown in Figs. 9 and 10 of the abandoned application [R.]. This is plainly the fact, because the '479 patent in suit discloses no form without flat screens, and no form in which the corrugations of adjoining

crimped members are disposed in opposite directions, and no form in which adjoining crimped members actually engage at the crests of the corrugations.

Claim 6, quoted above, was rejected by the Patent Office for lack of invention over the prior art [R. 953], and the applicant Farr abandoned such claim and the features specifically set forth therein by permitting the original application Serial No. 285,904 to become abandoned [R. 955].

We therefore submit that such facts establish an express abandonment by the applicant Farr of the P-5 form shown in Figs. 1 to 3 of his original application but not carried over into his application for the '479 patent in suit.

The law is plain that where, in response to rejection by the Patent Office, an applicant expressly withdraws from the application variant and alternative structures, it will be treated as an express abandonment, and the claims ultimately issuing to the applicant cannot be construed to cover such feature voluntarily withdrawn by the applicant: (*See: Ruud Mfg. Co. v. Long-Landreth-Schneider Co.*, 250 Fed. 860 (C. C. A. 2d 1918); *Lincoln v. Waterbury Button Co.*, 291 Fed. 594 (D. C. Conn. 1923); *Na-Mac Products Corp. v. Federal Tool Corp.*, 118 F. 2d 167 (C. C. A. 7th 1941).)

It is submitted that Farr expressly abandoned his original disclosure, and claim 6, to the specific features by which the accused P-5 filter distinguishes from the disclosure of the '479 patent in suit, and that the claims of the '479 patent cannot properly be construed to cover such features or defendants' P-5 filter.

(b) File-wrapper Estoppel.

We further submit that, under the well-established doctrine of "file-wrapper estoppel," plaintiff is estopped from contending for a construction of claims 4, 5, 7, or 8 of the '479 patent here in suit broad enough to recapture the specific features originally claimed by claim 6 of the abandoned application Serial No. 285,904 but forfeited by allowing such claim to become abandoned.

It is contended by plaintiff [R. 815-817] that claims 4, 5, 7, and 8 of the '479 patent in suit are all *broader* than abandoned claim 6 of the original abandoned application Serial No. 285,904. Even if so, the rule of file-wrapper estoppel applies to such a situation.

The leading case in point is that of *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 S. Ct. 627, 38 L. Ed. 500 (1894), in which the Supreme Court, in applying the file-wrapper estoppel doctrine, said at page 429:

" . . . But the patentee having once presented his claim in that form, and the Patent Office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim or such a construction of his present claim as would be equivalent thereto. *Leggett v. Avery*, 101 U. S. 256; *Shepard v. Carrigan*, 116 U. S. 593; *Crawford v. Heysinger*, 123 U. S. 589, 606; *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624.

“It is true that these were cases where the original claim was broader than the one allowed, *but the principle is the same if the rejected claim be narrower.* Why the claim of the present patent was allowed after the rejection of the narrower claim does not appear. The objections made to the claim as originally presented seem to be equally applicable to this.”

This doctrine of the *Morgan Envelope* case, *supra*, was quoted and applied in the more recent case of *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U. S. 211, 60 S. Ct. 710, 85 L. Ed. 132, in which the Court at page 137 (L. Ed.) said:

“It is a rule of patent construction consistently observed that a claim in a patent as allowed must be read and interpreted with reference to claims that have been cancelled or rejected and the claims allowed cannot by construction be read to cover what was thus eliminated from the patent. . . . The patentee may not, by resort to the doctrine of equivalents, give to an allowed claim a scope which it might have had without the amendments, the cancellation of which amounts to a disclaimer . . . The injurious consequences to the public and to inventors and patent applicants if patentees were thus permitted to revive cancelled or rejected claims and restore them to their patents are manifest. . . .

“True, the rule is most frequently invoked when the original and cancelled claim is broader than that allowed, but the rule and the reason for it are the same if the cancelled or rejected claim be narrower. . . .”

The doctrine was only recently applied by this Court in the case of *Gasair Corp. v. Ransome Co.*, 140 F. 2d 818, in which, at page 819, it said:

“This rejected claim described a device of the same nature but having only a single aspirator connected by a single pipe to a housing with a single outlet controlled by a valve which was actuated by changes in pressure in the main. That *this rejected claim is in a sense narrower than those allowed* does not impair its use as a means of discovering the limits of the claimed invention. *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 429, 14 S. Ct. 627, 38 L. Ed. 500.”

A patentee cannot construe the claims of his issued patent to cover specific features which were the subject of earlier claims which were rejected and then cancelled in response to the rejection. (See: *A. Schrader's Son v. James Martin Corp.*, 294 Fed. 620, 623 (C. C. A. 2d 1923); *Monitor Stove Co. v. Williamson Heater Co.*, 299 Fed. 1 (C. C. A. 6th 1924); *Aeration Processes, Inc. v. Lange*, F. 2d, 93 P. Q. 332 (C. C. A. 8th 1952).)

It is therefore submitted that plaintiff is estopped from construing the claims here in suit to cover features originally specifically claimed by abandoned claim 6 of the original abandoned Farr application, which features were not carried over into the drawing, specification, or claims of the '479 patent in suit, and which features are the distinguishing structural differences between defendants' accused P-5 filter and the filter of the '479 patent in suit.

Point 7. Defendants' P-5 Filter Does Not Infringe Because It Differs Substantially in Construction From That of the '479 Patent in Suit.

The defendants' accused P-5 filter differs substantially in construction from the filter disclosed in the '479 patent in suit. Such specific structural differences are shown by the following comparisons:

- A. The Farr '479 filter is composed of alternate layers of *flat* and *crimped* screen. The P-5 has *no flat* screen; it is entirely composed of crimped screen.
- B. In the Farr '479 filter, the corrugations of *all* of the crimped screens are *parallel*. In the P-5, alternate crimped screens have *oppositely angled* corrugations.
- C. The Farr '479 filter provides a number of individual passages or tunnels, each running from front to back of the filter. In the P-5, there are *no* such individual passages or tunnels.
- D. In the Farr '479 filter, the passages are of *uniform triangular cross section* and are *entirely surrounded* by the mesh of the screens. In the P-5, every space between adjoining screens is *non-uniform in cross section* and is in *open communication* laterally with many other spaces.
- E. In the '479 filter, the separate passages extend entirely through the panel and *subdivide it throughout its entire depth in both dimensions perpendicular to the air flow*. In the P-5, there are no passages which subdivide the *entire depth* of the panel.

<p>F. In the '479 filter there is a <i>change of direction</i> in the passages.</p>	<p>Since there are no distinct passages in the P-5, there is no such <i>change of direction</i>.</p>
---	--

The '479 patent is in a crowded art, and any structural variation from the art that can be asserted for it is minor in character. At best, it is for a mere improvement, and should be construed to be limited to the "*precise devices* described and claimed" therein, as this Court held in *Eaid v. Twohy Bros. Co.*, 230 Fed. 444, 447 (C. C. A. 9th, 1916). To the same effect, see: *Broadway Towel Supply Co. v. Brown-Meyer Co.*, 245 Fed. 659, 661 (C. C. A. 9th, 1917); *Pacific States Electric Co. v. Wright*, 277 Fed. 756, 758 (C. C. A. 9th, 1922); *Overlin v. Dallas Machine & Loco. Wks.*, 297 Fed. 7, 11 (C. C. A. 9th, 1924); *International Harvester v. Killifer Mfg. Co.*, 67 F. 2d 54, 62 (C. C. A. 9th, 1933); *Magnavox Co. v. Hart & Reno*, 73 F. 2d 433, 435 (C. C. A. 9th, 1934).

Since the '479 patent is merely for an asserted new combination of admittedly old elements (see p. 27), *supra*), it should be strictly construed to cover only the specific construction disclosed therein. See: *Stubnitz-Green Spring Corp. v. Fort Pitt Bedding Co.*, 110 F. 2d 192 (C. C. A. 6th, 1940); *H. H. Robertson Co. v. Klauer Mfg. Co.*, 98 F. 2d 150 (C. C. A. 8th, 1938); *Remington Rand, Inc. v. Meilink Steel Safe Co.*, 140 F. 2d 519 (C. C. A. 6th, 1944). *And see: Office Specialty Mfg. Co v. Fenton Metallic Mfg. Co.*, 174 U. S. 492 at 498 (1898).

Such a strict interpretation, limiting the scope of the claims of the '479 patent to that which is specifically disclosed should particularly be applied here where all of

the claims in suit are vague and indefinite at the only possible point of novelty (*see* p. 55, *supra*). *See: Shull Perforating Co., Inc. v. Cavins*, 94 F. 2d 357 (C. C. A. 9th, 1938); *Ford Motor Co. v. Gordon Form Lathe Co.*, 87 F. 2d 390 (C. C. A. 6th, 1937).

Furthermore, where only one form of the alleged invention is disclosed and described in the specification, the claims, read in the light thereof, should be limited to such specific form. *See: McRoskey v. Braun Mattress Co.*, 107 F. 2d 143 (C. C. A. 9th, 1939).

Under such circumstances, we do not think that this Court will accord to the claims of the '479 patent a broad interpretation which would cover all possible ways, heretofore and not yet conceived, of forming wire screen members in a filter so that they will "effect a multiple subdivision of the panel in both dimensions perpendicular to the general direction of flow of the medium to be filtered" (claim 4).

Under the law, the '479 patent claims should be read in the light of the specification and drawing. The '479 patent claims should therefore be limited by interpretation to cover only a filter as shown therein and having (a) alternate *flat and crimped* screens; (b) the corrugations of the crimped screen being *parallel*; and (c) the crimped screens forming *distinct passages of uniform triangular cross section* extending *entirely through* the filter element and *subdividing* the panel in both dimensions throughout its depth. Since the defendants' accused P-5 filter has none of such features, it does not infringe.

A comparison of the defendants' accused P-5 filter, and the filters of the Nistle (French) prior art patent [R. 1062] and the Farr '479 patent in suit shows, we sug-

gest, that the Niestle filter is more like the Farr '479 filter structurally than the accused P-5 is like the '479 filter. The Niestle filter has well-defined passages extending through it which subdivide it throughout its depth in two dimensions perpendicular to the air flow, just as is claimed of the '479 filter in suit. In the Niestle filter, the side walls of the mesh passages have relatively large openings along them which provide intercommunication laterally between passages, just as in the accused P-5 filter all of the spaces between the horizontal screens communicate laterally. If the '479 claims are construed broadly enough to cover the accused P-5, we submit that they read directly upon the Niestle prior art filter; on the other hand, if the '479 claims are construed narrowly enough to avoid anticipation by the Niestle patent (*e. g.*, limited to a filter having enclosed passages bounded on all sides by wire mesh), they obviously cannot cover the P-5, and there is no infringement.

The issuance of the Schaaf patent [R. 1080] to defendant Air-Maze, specifically covering its accused P-5 filter, and after consideration by the Patent Office of the Farr '479 patent, plainly indicates that the Patent Office considered them different types of devices. It raises a presumption that the P-5 does not infringe the Farr '479 patent in suit. *See: Ransome v. Hyatt*, 69 Fed. 148 (C. C. A. 9th, 1895); *Dunkley Co. v. Central Calif. Canneries*, 7 F. 2d 972, 977 (C. C. A. 9th, 1925); *Majestic Electric Appliance Co. v. Hicks*, 24 F. 2d 165 (C. C. A. 9th, 1928).

VI.

Conclusion.

The '479 patent in suit lies in the crowded air filter art. It is, at best, a combination of old elements selected from such art and which, we say, each individually performs the same function in the same way to produce the same result as it did in the art. Under the law, such patents must be judged in the light of the "inherent unlikelihood" of the presence of invention, and to them must be applied a severe test of invention. The '479 patent in suit, we suggest, fails to meet *any* test of invention, much less the high standard required in such cases.

The filter of the '479 patent in suit is identical with the Detroit Air Filter, except that it is made of wire fly screen instead of cardboard. The '479 filter is identical with the '480 prior use filter and air conditioner, except that it has a bend or change in direction in its passages. It is identical with the filter of the St. Cyr patent, even to the change in direction of its passages, except that possibly such change of direction is more abrupt in the '479 device. It is substantially identical with the filter of the Niestle (French) patent. Any of such possible differences, however, are shown or suggested in the other prior art filters of record, where they operate in the same way to produce the same result as in the '479 filter. We suggest that no invention was involved in the '479 patent in making such slight modifications of the prior art filters, particularly when the advantage of each of such modifications was forecast in the art.

Each of the claims of the '479 patent in suit is conveniently vague, indefinite, and functional at the only possible point of novelty and, under the law, should either be limited by interpretation to the precise structure shown and described in the '479 patent or held invalid as failing to meet the requirements of 35 U. S. C., Section 33. That the '479 patent in suit is merely for an assemblage of old elements is a further reason, under the law, for according its claims a narrow interpretation confined to the precise filter disclosed in the patent.

Defendants' accused P-5 filter differs structurally in many respects from the filter disclosed in the '479 patent. The P-5 filter has no flat screens, in it the corrugations of the crimped screens are not parallel, it provides no well-defined passages through the filter panel, all of which are found in the '479 filter. In the P-5 filter, all of the screens are crimped to provide angled corrugations, the corrugations of adjacent screens being oppositely angled and in contact with each other, all of which features were initially specifically claimed but subsequently abandoned by the applicant Farr as shown by the file-wrapper of the '479 patent and its parent abandoned application. If so confined by interpretation to the specific features shown in the '479 patent, the defendants' P-5 does not infringe as it does not include many of them, but in any event, the plaintiff is estopped by file-wrapper estoppel from recapturing by interpretation the very distinguishing features of the P-5 filter which were earlier specifically shown and claimed by the applicant Farr but later abandoned.

Only claims 4, 5, 7 and 8 of the '479 patent are involved here. If such claims are invalidated by this Court, plaintiff still will retain in the '479 patent the claims not here in suit, which cover the specific construction of the Farr filter. Such unlitigated claims will adequately protect the plaintiff against the copying of its filter by others, and yet industry will not have to pay tribute to the nebulous claims here involved.

Defendants submit that claims 4, 5, 7 and 8 of the '479 patent in suit are plainly invalid, but if valid are plainly not infringed by defendants, and that the judgment of the District Court should be reversed.

Respectfully submitted,

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PLATE I

EFFICIENCY & PRESSURE DROP UP TO 600 GRAM DUST LOAD OR END OF TEST, WHICHEVER EARLIEST

Filter Tested	Record Reference	Starting Efficiency	Final Efficiency	Increase or Decrease in Efficiency	Starting Pressure Drop	Final Pressure Drop	Increase or Decrease in Pressure Drop
Farr '479	[PX-11, 13; Duncan's test at 519 F.P.M.]	78%	75%	-3%	0.10"	0.11"	+10%
Farr '479	[DX-JJ; Rowley's test at 300 F.P.M.]	87%	77%	-10%	0.05"	0.13"	+160%
Farr '479	[DX-VV; District Court's test]	76%	78%	+2%	0.05"	0.29"	+190%
Air-Maze P-5 Obsolete	[DX-II; Rowley test]	84.5%	76.5%	-8%	0.05"	0.075"	+50%
Air-Maze Type B.	[PX-11; Duncan test]	75%	74%	-1%	0.13"	0.17"	+39%
Air-Maze P-5	[PX-13; Duncan's test at 519 F.P.M.]	76%	72%	-4%	0.10"	0.13"	+30%
Air-Maze P-5	[PX-30; Rowley's test at 300 F.P.M.]	77%	77%	0%	0.05"	0.14"	+180%
Detroit Air Filter	[PX-1A, pg. 36]	88%	86%	-2%	0.06"	0.08"	+33%
Detroit Air Filter	[Duncan test, R. 196]	65%	73%	+8%	0.23"	0.28"	+21%
Detroit Air Filter Made of Fly Screen	[DX-XX; Brown test]	83%	88%	+5%	0.095"	0.14"	+47%
Nestle Prior Art	[DX-ZZ; Brown test]	79.5%	70%	-12%	0.075"	0.14"	+86%



No. 13352

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES D. GRATIOT and AIR-MAZE CORPORATION,
Appellants,

vs.

FARR COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLEE.

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Appellants,

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FARR COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

This is an appeal from the decree entered by Judge Hall in the Southern District of California, Central Division, sustaining the validity of Letters Patent No. 2,286,479 to Farr on an "Air Filter Panel" and holding that appellants have infringed each of Claims 4, 5, 7 and 8 thereof.

Appellants are the Air-Maze Corporation and Jules D. Gratiot, a factory representative of Air-Maze Corporation. Appellant Air-Maze Corporation conducted the entire defense of the case, agreed to pay all the expenses of the suit, and to indemnify the defendant Jules D. Gratiot [R. 319-322]. The Farr Company was first formed in Los Angeles by the patentee, Morrill N. Farr, and his two sons, as a partnership, which later became the corporation known as Temperatair, Inc., name of which was later changed to the Farr Company.

The air filter panels of the type of the patent in suit are principally employed in air ventilating systems or in the intake systems to engines, such as diesel railroad engines or aircraft engines. Most of the sales of this type of air filter panel are to highly technically trained people, such as engineers or architects engaged in designing engines or ventilating systems [R. 258, 259].

The filter panels are intended to remove dust from air by contacting the air with collective surfaces which are oiled to cause the dust to adhere thereto. In use of such filters the adhering dust is retained in the air filter panel as a "dust load" until the air filter panels are removed, cleaned, re-oiled and again inserted in use. This type of air filter is known as an "impingement type" filter.

Two factors of primary importance in an impingement type filter are the efficiency of the filter in removing dust from air and the pressure drop through the filter. Both of these change as the filter panel becomes loaded with dust.

Previous to the invention of the Farr patent in suit all prior impingement type air filters either possessed a low filtering efficiency or a high pressure drop, or a pressure drop which rose rapidly when the filter became loaded with dust. The Farr patent in suit provided *for the first time* in the art a filter panel which combined a *high efficiency* in removing dust from air and at the same time provided a *low pressure drop* which did *not increase rapidly* with increased dust load. The Farr air filter is capable of filtering 50% more air than previous filtering panels and is economical in construction, maintenance and ease of cleaning.

The Farr patent discloses a filter utilizing corrugated wire screens. The corrugations have an angle therein and are set parallel to the direction of air flow through the filter. The corrugations provide a large number of small passages having an angle therein for the flow of air through the filter which passages are distinct from the openings in the mesh of the wire screen. The novel properties of the Farr filter are dependent, however, on the fact that the air is forced through the mesh of the screen until the mesh of the screen becomes loaded with dust. The passages which are separate from the mesh of the screen insure high efficiency while preventing the pressure drop rising rapidly with the dust load.

The Farr patent in suit has had a most unusual commercial success. The business was started by the inventor and his two sons in a small room with substantially no capital. They entered into competition with large and powerful corporations already entrenched in the field. Due solely to the intrinsic value of the filter panel of the patent in suit the business grew steadily until in the year 1951 the sales of the Farr filter panel were in excess of One Million Eight Hundred Thousand Dollars. The business has now expanded until it now occupies a large new manufacturing plant employing some one hundred fifty people and the Farr filter panels are sold throughout all of the States of the United States and many foreign countries [R. 303].

As early as 1942 the Air-Maze Corporation attempted to suppress the manufacture of the Farr filter panel by bringing action in the Southern District of California for alleged infringement of the Greene Patent No. 1,566,088 under which Air-Maze was then manufactur-

ing its Type A and Type B filter panels. The Air-Maze Type A and Type B filter panels are made of screen wire but the air is passed perpendicular to the planes of the screen rather than parallel as in the Farr panels, so that there exists no passages for the air except through the openings of the screens. This case resulted in a judgment in favor of Farr on the ground that the patent was not infringed [Pltf. Ex. 17; R. 957-974]. Air-Maze then found it necessary to meet the competition provided by the Farr air filter panel and to bring out a filter panel capable of providing high efficiency with low pressure drop which rises slowly with increased dust load. They first commenced the sale of an air filter panel referred to in the record as the "P-5 Obsolete." In 1948 they found it necessary, however, to commence the manufacture of the P-5 filter panels which are complained of herein [R. 327].

Appellants' P-5 filter panel is a substantial copy of the Farr patent in suit. Its construction, mode of operation and performance is substantially identical with that of the Farr filter panel. It possesses the unique characteristic of the Farr filter panel of providing high efficiency with low pressure drop and slow rise in pressure drop. It possesses the same low cost of manufacture, with low cost of maintenance and ease of cleaning. It differs from the Farr patent in suit principally in the use of corrugated screen wire having two angles in the corrugations rather than one, which difference is without substantial effect on the mode of operation or performance of the panel. It omits the use of flat screens but in so doing is not in fact departing in any respect from the Farr invention.

The original application for the Farr patent in suit [Ex. 1-B; R. 939] discloses filter panels omitting flat sheets and the proceedings in the Patent Office demonstrate that Farr always intended to include both filters containing flat screens and filters omitting the flat wire screens. The patent in suit contains two sets of claims, Claims 4, 5, 7 and 8 in suit not limited to the flat screen, and Claims 1, 2, 3 and 6 in express terms limited to the flat screen.

The trial court made Findings in accordance with Rule 52 of the Rules of Civil Procedure. These Findings are fully supported by the record and met and disposed specifically of every issue urged in Appellants' brief. They may be summarized as follows:

First, that the Farr patent in suit for the first time provided the art with a filter panel which combined the ability to provide high efficiency in removing dust from air with a low pressure drop which does not increase rapidly [Findings 5, 6, 8, 9, 10, 11, 12, 13 and 14].

Second, that the public has recognized the value of the air filter panels of the Farr patent in suit which has gone into commercial use at a steady, rapid and increasing rate and has been responsible for the development of an important business [Finding 7].

Third, that the Farr filter panel discloses a new combination of elements providing not only new benefits and advantages in the cleaning of air but in cost of manufacture, maintenance and upkeep, which combination is not disclosed in any prior art patents [Findings 10, 11, 12, 13 and 14].

Fourth, that for many years prior to the invention of the Farr patent in suit, the prior art air filters had

been made the subject of great effort and money in scientific study in testing without the Farr filter panel being suggested therefrom [Finding 14].

Fifth, that while Claims 1, 2, 3 and 6 of the Farr patent (which are not in suit) are expressly limited to the use of flat wire screen, Claims 4, 5, 7 and 8 (in suit) are not limited to the use of such flat wire screen and were not intended by the Patent Office to be so limited [Finding 21].

Sixth, that the P-5 air filter panels are essentially and basically the same as the air filter panels of the Farr patent in suit, possessing the same mode of operation and the same characteristic advantages [Findings 19 and 20].

Rule 52 of the Rules of Civil Procedure provides in part:

“Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

The Supreme Court in its recent decisions has emphasized that a court of Appellate Review must not disturb such findings unless the same are clearly erroneous.

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U. S. 271, 93 L. Ed. 672;

Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 339 U. S. 605, 94 L. Ed. 1097;

Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Company, 321 U. S. 275, 88 L. Ed. 721.

This Court has in its recent decisions followed the rule that the Findings of the trial court where supported by substantial evidence should not be disturbed.

“The Court, by its above mentioned findings, determined two questions—the question of novelty and the question of invention. Both were questions of fact. *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 9 Cir., 151 F. 2d 91; *Maulsby v. Conzevoy*, 9 Cir., 161 F. 2d 165. The findings are supported by substantial evidence, are not clearly erroneous and should not be disturbed.”

Refrigeration Engineering, Inc. v. York Corporation, 168 F. 2d 896, 899, C. C. A. 9.

See also:

Faulkner v. Gibbs, 170 F. 2d 34, 37, C. C. A. 9.

The Findings of Fact of the trial court herein are not only supported by substantial evidence but, indeed, the record does not contain any evidence which would sustain any contrary findings.

The principal issues raised by Appellants in their brief are:

First, Appellants' contention that the patent in suit does not disclose a patentable combination for the alleged reason that it produces no new, surprising or unexpected results. In making this contention Appellants rely primarily on the decision of the Supreme Court in *Great A & P Tea Co. v. Supermarket Equipment Corporation*, 340 U. S. 147, 95 L. Ed. 162, and the 1952 decision of this Circuit in *Himes v. Chadwick*, 95 U. S. P. Q. 59. In these cases the sole novelty asserted in the combination of the elements of the patent resided merely in a change in dimension or the number of parts resulting in no new or different function or no new result or

unusual or surprising consequences. As stated by this Court in the *Himes v. Chadwick* case:

“The test is whether the unification of the elements brought into the combination produces ‘unusual or surprising consequences.’ *A. & P. Tea Co. v. Supermarket, supra*; *Packwood v. Briggs & Stratton Corp., supra.*”

In the instant case the trial court has specifically found the new and surprising result called for by this test in its expressed findings that the filter panels of the patent in suit were the first to combine the high efficiency in removing dust from the air with a low pressure drop which does not rise rapidly. These findings are fully supported in the record and on this issue therefore the case is governed by the rule set forth in such decisions as

Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U. S. 362, 86 L. Ed. 1537;

Bianchi, et al. v. Barili, 168 F. 2d 793, C. C. A. 9;

Page, et al. v. Myers, 155 F. 2d 57, C. C. A. 9.

These decisions set forth that where the trial court has found the patent in suit to produce results of unusual and surprising circumstances which are supported by substantial evidence and not clearly erroneous the findings that the patent in suit represents a new patentable combination should not be disturbed.

Second, Appellants assert that no invention would be involved in producing the Farr filter panel from the prior Detroit air filter panel. The Detroit filters are made of sheets of paper corrugated and arranged parallel to the flow of the air but the air passages have no mesh members so that it is impossible for the air to flow anywhere except down the passages. The record demonstrates

that the paper filters do not have either the mode of operation or the characteristic performance of the Farr filter panel. If built with similar pressure drop such filters are 7 to 10% less efficient in removing dust from air [R. 330].

The Detroit air filters have been on the market since 1932 whereas the old Air-Maze Type A or Type B filters made with screen wire have been sold for a longer period of time. It is Appellants' theory that the patent in suit should be held invalid on the ground that it allegedly required no invention to use wire screen in a Detroit air filter panel. The lower court reviewed the testimony in the record concerning the immense amount of scientific study given by skilled men to the design, testing and construction of filters. Although these skilled men had simultaneously tested and compared the Detroit paper filter and the Air-Maze Type B wire screen filter, the Court noted that these skilled men had received no suggestion therefrom of the invention of the patent in suit. The Court found that the Farr filter panel has a different mode of operation and new unexpected advantages over the Detroit air filter panel and concluded as a fact that the Farr filter panel represented an invention thereunder.

On this issue the case is clearly governed by such decisions as *Goodyear Tire & Rubber Company, Inc., et al. v. Ray-O-Vac Company*, 321 U. S. 275, 88 L. Ed. 721, and *Oliver-Sherwood Co., et al. v. Patterson-Ballagh Corporation*, 95 F. 2d 70, C. C. A. 9, which set forth the rule that where the patent in suit is shown to involve a new construction, new mode of operation and new and unexpected result a patentable invention may be

present and Findings of Fact on such issue by the lower court not clearly erroneous should not be disturbed.

Third, Appellants contend that the Farr patent in suit is invalid for lack of invention over prior patents to St. Cyr and Niestle (French). As found by the lower court the devices of these patents neither contain the combination of elements nor provide the mode of operation of the patent in suit. The St. Cyr patent is not even directed to an air filter panel and neither it nor the Niestle patent are capable of providing the characteristic advantages of the Farr patent in suit. There is no basis for setting aside the Findings of Fact of the lower court with respect to these patents.

Fourth, Appellants allege that the P-5 filter panels do not infringe Claims 4, 5, 7 and 8 in suit. This contention is made notwithstanding the fact that Appellants' P-5 filter panels are substantially a deliberate copy of the patent in suit. All of Appellants' contentions with regard to non-infringement are different variations of Appellants' insistence that, by the omission of flat wire screen, Appellants have avoided the patent in suit. The lower court found that Appellants' P-5 filter panel was basically identical with the patent in suit; that they were of substantially identical construction, mode of operation and performance. These Findings are fully supported by the evidence and not clearly erroneous and should not be disturbed. The fact that filters omitting flat screens were shown in the original Farr application and are not specifically shown in the patent in suit creates neither any abandonment nor estoppel. The rule is well settled that an inventor abandons none of the forms of his invention merely by substituting a continuation application showing only the best form of his

invention in place of his earlier application showing several forms.

Research and Development Corporation of Illinois v. Chase, et al., 88 F. 2d 353, 355, C. C. A. 7.

The record demonstrates that the P-5 filter panels are an unscrupulous copy of the Farr patent in suit with only unimportant and insubstantial changes which do not effect the mode of operation or performance of the panel. The marketing of this panel by Air-Maze Corporation is a most brazen attempt to pirate the invention of the patent in suit. The Supreme Court in its recent decision in *Graver Tank & Manufacturing Company, Inc. v. Linde Air Products Company*, 339 U. S. 605, 94 L. Ed. 1097, has expressly and most emphatically emphasized the rule that such an unscrupulous copyist should not be permitted to escape the charge of infringement by merely resorting to unimportant, insubstantial changes.

There is no merit to any of the contentions set forth in Appellants' brief. When analyzed they will all be found to be predicated on erroneous contentions of fact opposed not only to the Findings of Fact of the lower court but the overwhelming evidence in the record.

Statement of Facts.

The Farr Patent in Suit:

The Farr filter panel is described in the patent as formed of screen wire member 4 which is crimped or corrugated as illustrated in Figure 3. These crimps form roughly triangular shaped valleys which are referred to in the patent as air passages 5 leading through the filter panel. The crimps are at an angle to the face of the filter and in addition thereto, as indicated

at 6, these crimps change abruptly in direction. Thus the air flow through valley 5 must change direction not only as it enters the valley but again at the angle 6 of the crimps. The "air passages" of the filter panel of the patent in suit are formed and defined solely by the crimped or corrugated wire screen 4. Thus on page 1, column 2, lines 22 to 43, of the patent, the passages 5 are described as provided by the crimped or corrugated screen 4 and the change of direction of said passages is described solely in connection with the description of the corrugations of sheets 4 [Patent in suit, p. 1, col. 2, lines 22 to 43, R. 839].

The patent also describes the flat or uncrimped screening members 9. These flat screening members merely provide slight additional dust collecting surfaces, facilitate the process of manufacture and stiffen the filter. [R. 111]. The only purpose asserted for the flat screens of the patent in suit is as follows:

"* * * the flat or uncrimped screening members
* * * serve both to define more restricted passages for the flow of air and also to better retain the filter members 4 in their desired positions. The flat screens 9 also aid in the filtering action, providing surfaces for collection of air by impingement action."
[Pltf. Ex. 1, p. 2, col. 1, lines 7-14.]

Claims 4, 5, 7 and 8 of the patent in suit cover the crimped mesh screening members defined as not only extending in the general direction of the air flow through the panel but as effecting "a multiple subdivision of the panel in both dimensions perpendicular to the general direction of flow." This language does not appear in the specification but it is conceded that such language is readily understood in connection with the specification

and drawings [R. 360]. Examining, for example, either Figures 1 or 2 of the drawings [R. 839], one of the two dimensions specified is along lines horizontal to the figures while the other dimension specified is along lines vertical to the figures. The direction of air flow is perpendicular to the plane of the figures and thus perpendicular to both the horizontal and vertical dimensions of the drawing.

Each successive sheet divides the panel in the vertical direction and the curved, crimped, or corrugated wire screens divide the panel in the horizontal direction. Thus the air passages at the face of the panel appear as roughly triangular and there is a very large number of these small air passages provided. The importance of this division of the panel and the small passages is pointed out in the specification, for example, in the patent, page 1, column 1, lines 40-53.

The air filter panel of the patent in suit thus consists essentially of (a) a plurality of sheets of *corrugated wire screens* arranged *parallel* to the direction of air flow and *forming air passages* through the filter which are independent of the openings in the screen; (b) the arrangement of the corrugated wire screen sheets to *divide the panel* both in the horizontal and vertical dimensions into a *multiple of small* passages, the walls of which are formed by the mesh of the wire screens; and (c) the formation of passages having *an angle* therein so as to change the direction of air flow [R. 127].

While there is thus formed passages for the flow of air distinct from the openings of the screen it is to be understood that the air filter panel of the patent in suit is dependent for its filtering action on the air actually

passing through the openings of the screen. Thus the patent points out:

“* * * It is to be understood, of course, that certain portions of the air will flow through the mesh of the screens into adjoining passages, but as the mesh of the filter members becomes progressively loaded with dirt the flow of air becomes more and more confined to the flow through the entrance and exit passages.” [P. 2, col. 1, lines 23 to 29.]

and

“* * * This indicates that the air entering the passage 7 is almost immediately broken up into fine streams of air flowing through the screening openings of the wire forming the passage. * * * This action continues, without substantial increase of the static pressure or resistance to the flow of the air, until all portions of the screen forming the walls of the passage 7 have become thoroughly coated with dust.” [P. 2, col. 2, lines 18 to 33.]

At the trial photographs were introduced to illustrate progressive loading in both the air filter panels of the patent in suit and in the infringing Air-Maze P-5 filter panels. The dust is collected near the entrance side of the panel and partially closes first the openings at the entrance side. These photographs are present as plaintiff's physical Exhibits 9A to 9J showing the Farr filter panel and 14A to 14G showing the accused Air-Maze P-5 filter panel [R. 129-136 and R. 163-166].

The flow of air through the openings of the screen rather than merely through passage 7 is in part dependent upon the angle placed in the crimp of the crimped wire sheets. Thus the patent says:

“* * * The abrupt turn in the passage provided between the entrance and exit portions 7 and 8 af-

fords two important functions in the operation of the screen. One function of such bend is that it imposes some pressure drop to the flow of air directly through the passage 7, effective for forcing the air through the openings of the screen forming the passage. This function is important because the *filtering efficiency of the filter is dependent upon the fact, to a large extent, that the air rather than flowing in a stream through the passages 7 and 8 is caused, in fact, to flow through the walls of such passages and the screening openings there provided.*" [P. 2, col. 2, lines 32-46.]

The Patent in Suit for the First Time Provided a Filter Panel Possessing High Efficiency in Removing Dust With a Relatively Low Pressure Drop Which Rises Relatively Slowly.

The lower court found:

"6. The air filter panels of the Farr patent in suit combined the ability to provide a high efficiency in removing dust from air with a lower pressure drop than previous commercially built filters which pressure drop did not increase as rapidly as previously built commercial filters as the filter became loaded with dust, * * *" [R. 60].

"9. The Farr patent in suit does not disclose an aggregation but does disclose a new combination of old elements which cooperate together to provide not only advantages in the cleaning of the air but benefits in cost of manufacture, maintenance and upkeep." [R. 61.]

These findings are not only fully sustained in the record below but they are the only findings which the record could support. The record established conclusively that

air filter panels of the type of the patent in suit are sold to men of high technical training [R. 259]. These men have, from a time long preceding the date of the Farr patent in suit, learned to evaluate air filter panels by comparative tests which illustrate the efficiency of the filter in removing dust from air and the pressure drop of such filter. The results of such tests are regularly in this art illustrated by curves or charts which are contained in the bulletins of the air filter manufacturers. Such curves appear, for example, in the catalog of the Air-Maze P-5 filter panel at the top of sheet 3 [Ex. 4].* They also appear in the Farr catalog, for example, *Exhibit E* on the last page and Exhibit 7 on the fourth page.

Appellants produced as their expert witness Frank B. Rowley, Professor Emeritus of the University of Minnesota, who had some twenty-five years' experience in testing and evaluating air filters [R. 476]. As early as 1933 the American Society of Heating and Ventilating Engineers had sought to introduce a certain standard code by which air filters should be tested [R. 478]. The importance of this type of investigation of air filters is further shown by the action of the Association of American Railroads. In 1937 that Association had an elaborate series of tests conducted by Appellants' witness Rowley for the purpose of evaluating by such tests all commercially sold filters. The results of these tests so conducted by Rowley are in evidence as Plaintiff's Exhibit 27 published January 15, 1938 [R. 609, 610]. The memorandum opinion of Judge Hall demonstrates the importance placed by Judge Hall on the exhaustive and painstaking study of filters

*Exhibit 4 is not reproduced in the Book of Exhibits but appears here by stipulation in its original form.

made in the art as particularly evidenced by this report, Plaintiff's Exhibit 27,* which is clearly identified in the record by Appellants' witness Rowley. Appellants' contention that this report is hearsay is not supported by the record. The record shows that the tests referred to in this report were performed by Appellants' witness Rowley who, although he did not write the full report, furnished the data, examined the report after it was published, performed the tests reported therein, provided the pictures, and subscribed to the conclusions set forth in such report [R. 610-621 and 629-657].

Plaintiff's Exhibit 27 contained some twenty-eight dust test performance curves on different filters. Similar curves were presented to the Patent Office in the prosecution of the Farr patent in suit [R. 875] and Plaintiff's Exhibits 11, 13, 29, 30, 31, and Defendants' Exhibits HH, MM, NN, VV, XX and ZZ are further dust test performance curves which form the basis of the Findings of Fact of the lower court. In considering these dust performance curves it should be appreciated that it is difficult to make comparisons unless tests were performed using the same test dust [R. 574, 718, 719]. Dust particles of large size are easier to remove than dust particles of small size [R. 716-718]. The presence of lint in the dust will cause the panel to clog up relatively rapidly [R. 719]. The art has not yet agreed upon any standard test dust. The American Society of Heating and Ventilating Engineers' Code specified a dust containing 50% carbon black

*Exhibit 27 is not reproduced in the Book of Exhibits, although originally stipulated to be reproduced, because of the insistence of the Clerk that the reproduction of this exhibit would be very expensive. This important exhibit is now by stipulation present in its original form, which stipulation approved by this Court provides it may be considered in its original form.

and 50% Pocahontas ash [R. 486]. The test as performed for the Association of American Railroads employed a dust containing 50% Pocahontas ash, 20% lamp-black, 10% Fullers Earth and 20% Fly Ash [Ex. 27, p. 4]. Rowley in his test performed for the purpose of this case employed 80% Pocahontas ash and 20% carbon black [R. 488]. The Bureau of Standards endorses a dust containing 96% Cottrell Precipitate and 4% lint [R. 492].

The Farr Company in some of its earlier test procedures used a dust collected from a ventilating system but as shown hereafter has conducted tests with various other dusts. It has now adopted for its test procedure a test dust developed in the last war to test air filters. This test dust is a natural earth material obtained in Arizona and is guaranteed in particle size analysis [R. 119, 120]. This test dust is adopted by Farr because it gives more significant results [R. 120].

There exists in the record four distinct sets of test data, the individual tests of a set being performed with the same test dust. Each set, when considered by itself, clearly demonstrates the unique performance characteristics of the Farr filter panel in suit.

The first of these are those contained in the file history of the patent in suit. During the proceedings leading to the grant of the Farr patent in suit there was submitted to the Patent Office the test results on three different filters. These results are shown in the curves on the exhibits to that affidavit [R. 875]. The curves marked "1" were obtained by testing the filter panel of the Farr patent in suit. The curve marked "2" are tests obtained on the Air-Maze Type B filter, and the curve marked "3" was obtained on the Detroit paper filter. The comparison is

most easily obtained by examining the curves [R. 875]. These curves show that the Detroit paper filter has an efficiency of about 10% less than the Farr filter and that the Air-Maze Type B filter has a much more rapidly rising pressure drop than the Farr filter [R. 261-267].

Appellants' suggestion (App. Br. p. 10) that these tests are "fantastic" as to the 90% efficiency of the Farr filter finds no support whatever in the record and Appellants have made no reference to anything in the record to support its statement. It is to be noted how accurately this test conformed to the testimony of Appellants' witness Watterson with respect to the Detroit paper filters. Watterson testified that they were from 7% to 10% less efficient [R. 330].

The second set of test data consists of the tests run by Professor Rowley for the Association of American Railroads on all commercial filters made previous to the Farr invention as shown in Plaintiff's Exhibit 27 considered with Plaintiff's Exhibit 29 [R. 977]. Plaintiff's Exhibit 29 is a report on tests of the Farr filter performed using the identical dust utilized by Rowley in making the test of Plaintiff's Exhibit 27. Plaintiff's Exhibit 27 shows tests on a very large number of filters, *i. e.*, paper filters by the American Radiator Company both in single section and in tandem, and tests on filters made by the Annis Air Filter Company, the Brillo Manufacturing Company, the Burgess Battery Company, the Independent Air Filter Company, the Owen-Illinois Glass Company, the Plymouth Cordage Company, the Safety Car Heating & Lighting Company, Wilson and Company, American Air Filter Company and the Air-Maze Company. It was these tests which were mainly relied upon by the lower court in its findings that the patent in suit repre-

sented a distinct advance over the prior art [R. 821, 822].

Exhibit 27 contains three charts on the Air-Maze Type A or Type B filter, Figures 6, 7 and 8. They all show a relatively rapid rise in pressure drop as the dust load increases, which is characteristic of the Type A or Type B filter. They all show an efficiency comparatively low to either the filter of the Farr panel in suit or Appellants' infringing P-5 filter. For example, Figure 8, Exhibit 27, which is the Air-Maze 2-inch Type A filter, has an efficiency starting from 75% to 80% and ended at 80% after eight hours of test while the pressure drop rises from 0.15" and ends at 0.44" [R. 630].

Exhibit 29 is a publication of the Farr Company made of tests performed by Duncan in 1942 [R. 711]. Duncan reproduced the tests of the American Association of Railroads using the dust there employed [R. 713]. The graph accompanying Exhibit 29 contains three curves. One represents the filter of the American Air Filter Company, one represents the Air-Maze Type A filter, and the third represents the Farr filter. As shown from such curves the Farr filter has a higher efficiency than either of the others and the pressure drop of the Farr filter changes in the tests from an initial value of 0.05" to only 0.1." The Air-Maze Type A filter has the rapidly rising pressure drop starting at 0.15" and ending at 0.44." The pressure drop of the American Air Filter Company's panel was consistently higher than that of the Farr Company [R. 713].

Figure 23 of Exhibit 27 again shows a startling lower efficiency of the paper filters as compared with those made with screen wire. The starting efficiency of a paper filter is only 65% as compared with the Farr efficiency of 90%, the Air-Maze starting efficiency of 75%, and the starting

efficiency of the American Air Filter Company of 79%. All of these tests were conducted with identical dust under substantially identical conditions [R. 637 to 642].

The third set of test data which demonstrates the unique performance of the filter panels of the Farr patent in suit, is a test conducted by Duncan with the Farr Company's new and improved test procedure. The Farr Company has expended great effort in developing a more perfect test procedure. Their new test procedure is shown in the technical report to the industry, Plaintiff's Exhibit 8.

The inaccuracies of earlier test procedure is illustrated in the testimony of Rowley [R. 585-593] wherein it is brought out the actual measurements obtained by Rowley differ quite radically from the curves he drew representing such measurements. He testified:

"It is our experience in testing any of this kind of apparatus and rating it, that you cannot get curves to fall right on the lines, * * *." [R. 592.]

At the trial Professor Rowley was invited to and did examine the Farr test procedure and admitted that within the Farr test measurements the measurements corresponded closely to the curves [R. 593], and plaintiff stipulated:

"* * * we are willing to stipulate that the Farr Company has very fine test apparatus, that Professor Duncan gets accurate results with it, and that the Farr Company test procedure for the purposes of this action is the best in the world." [R. 593.]

The data obtained from tests on this new test procedure is shown on Plaintiff's Exhibits 11 and 13. Plaintiff's Exhibit 11 is a comparative test of the Farr filter

panel of the patent in suit and the Air-Maze Type B filter panel. It requires but a simple inspection of this curve to notice the characteristic differences in the pressure drop of the two panels. In the case of the Air-Maze filter the pressure drop of the Air-Maze Type B filter started at 0.13" and ended at 0.50". It is noted that the pressure drop rises very rapidly after 600 grams of dust load is on the filter. The pressure drop of the Farr filter in comparison therewith starts at 0.10" and rises only to 0.13". [R. 145 to 149.]

Plaintiff's Exhibit 13 is a graph on the performance of the Air-Maze infringing P-5 filter as compared with the Farr filter of the patent in suit. It requires but a simple inspection of this chart to show that these two filters operate substantially similar both as to efficiency and pressure drop. The pressure drop of the two filters is so closely identical that over the major portion of the test a single line represents the pressure drop of both filters and at the end of the test the P-5 filter is only slightly higher than that of the Farr filter panel [R. 159 to 161].

The fourth set of the test data which demonstrates the unique characteristic of the Farr filter panel in suit is that provided by the test made for the trial by Professor Rowley. Professor Rowley tested only the Farr filter panel of the patent in suit, the accused Air-Maze P-5 panel and a model allegedly (although as shown hereafter not) made in accordance with the disclosure of the prior art patent to Niestle [Deft. Ex. B, Tab 15, R. 1063]. He made no test by which we can compare the performance of the old Air-Maze Type A or Type B filters or the Detroit filters. The results of Professor Rowley's tests on the P-5 filter and the Farr filter are in evidence

as Defendant's Exhibits HH and JJ. To compare these results Duncan replotted the same on a single chart, Plaintiff's Exhibit 30 [R. 984]. As shown on Plaintiff's Exhibit 30 Professor Rowley's test again demonstrates that the accused P-5 filter and the Farr filter are similar in efficiency and the pressure drop characteristics are identical both in rising comparatively slowly so that up to a load of about 550 grams the pressure drops are identical and represented by one curve there being but a slight rise in the curves thereafter [R. 599-603, 722-725].

The only alleged prior art filter with which these can be compared is Rowley's tests on the model allegedly constructed in accordance with the Niestle French patent. The results of his tests on that model appear on Defendants' Exhibit MM [R. 513-515]. In this exhibit it is to be noted that the pressure drop started at 0.10" and rose at such a rapid rate as to become nearly 0.5" at the conclusion of the test. A mere visual comparison of Plaintiff's Exhibit 30, which shows the test performed by Rowley on the Farr filter panel and the accused Air-Maze P-5 filter panel, with Exhibit MM is sufficient to show that both the Farr filter panel and the infringing P-5 filter panel are high in efficiency as compared with the alleged model of the Niestle patent and differ radically in the rate of pressure drop rise from the model of the Niestle patent.

Findings 5, 6, 8, 9, 10, 11, 12 and 13 of the lower court are fully sustained. Plate I attached to Appellants' brief makes no honest effort to correctly set forth to this Court what these tests demonstrate. While Appellants admit that the test results obtained using different dusts were not comparative (App. Br. p. 8) Plate I fragments some of the results of tests using different dust all in one

group. More than this, Appellants adopt the unique procedure of giving the values up to only the figure of 600 grams dust load or to the end of the test as Appellants state "whichever earliest." The reasons for Appellants' action in this respect is illustrated most easily from Plaintiff's Exhibit 11. As shown on Plaintiff's Exhibit 11 it is only after the old Air-Maze Type B filter has been loaded to within the neighborhood of 600 grams that a rapid rise in pressure drop occurs. By this selection of figures the Type B filter is indicated as having a final pressure drop of 0.17" or a rise of 30%, whereas Exhibit 11 shows that the final pressure drop was 0.5", or a rise of 290%.

The tabulation of Appellants in their brief also includes figures on the test of the Detroit air filter using different dusts and gives these figures "at the end of the test" without mentioning the fact that these tests on the Detroit air filter were terminated at very low dust loads. Duncan explained the reason the tests on the paper filters had to be terminated at a low dust load was because the nature of the adhesive would not permit a continuation of the test [R. 212 to 214].

Reference is also made by Appellants to the tests run in the presence of both Duncan and Rowley using dust recommended by Rowley in the Farr apparatus. This test was run with an air velocity in the filter much higher than velocity during Rowley's tests and is responsible for the greater pressure drop shown on this test [Pltf. Ex. 31] over that shown on Rowley's test, also plotted on Exhibit 31. There was unfortunately not time enough after this test was suggested for similar tests to be run on the P-5 filter or the old Air-Maze Type B, or the Detroit paper filters, or the alleged models of the Niestle patent.

Standing by itself, therefore, this test only confirms the extraordinary accuracy of the Farr test procedure indicating how each successive measurement fell in line with the previous one. If similar tests had been made on the prior art filters they would all have shown either a more rapid rise in pressure drop than indicated on this test or marked lower filter efficiency [R. 735].

The Farr Company recommends that its filter be cleaned at a dust load of 600 grams but the ability of the Farr filter panel to perform satisfactorily above such a load is unquestionably a factor of major importance in the use of air filters. A filter in which the pressure drop rises rapidly may have the effect of unbalancing a ventilating system or decreasing the air intake to an engine so as to decrease the horsepower, or where used in a home system results in burning out of the fire box [R. 285, 286]. While the manufacturer recommends filters be cleaned at a certain dust load the human element enters and in many applications the dust load on filters may rise greatly in excess of that intended by the manufacturer [R. 286, 287].

The fact that the Farr filter was the first to combine high efficiency in dust removal with a low pressure drop which rises but slowly is not only fully supported by the test data shown above but actually amounts to a substantially conceded fact. The testimony of Watterson, Vice President of the Air-Maze Corporation, clearly establishes this. This witness conceded, first, that the Detroit air filter was 7 to 10% less efficient in removing dust although providing a low pressure drop rise [R. 330]. He identifies the first air filter panel manufactured by the Air-Maze Company having high efficiency and low initial pressure drop which rose slowly with dust load, as the "P-5 Obsolete" filter made by Air-Maze long subsequent to the

issue of the patent in suit [R. 327]. This filter proving unsatisfactory the customers compelled Air-Maze to put out the infringing P-5 filters [R. 328]. The Air-Maze Company, although regularly making tests on all its filters [R. 327], and although still selling the old Type A and Type B filters, as well as the accused P-5 filter, produced no comparable tests of these two types of filters run with the same dust under comparable conditions.

The Combination of Elements of the Farr Patent in Suit With the Resulting Characteristic Performance Is Not Disclosed in the Prior Art.

The lower court found that the Farr patent in suit disclosed a new combination of old elements [Finding 9, R. 61] combining old elements in a new way so as to provide a new mode of operation and new characteristic performance [Findings 3-6, incl., 8-14, incl.]. These Findings of Fact are fully sustained by the evidence and should not be disturbed here. (*Williams Mfg. Co. v. United Shoe Mch. Corp.*, 316 U. S. 364, 86 L. Ed. 1537.)

Appellants *merely cull* from one or another prior patents *elements* of the combination in suit *without showing that the combination is old* or without establishing that there exists in the prior art any filter panel combining the elements of the patent in suit or possessing its new mode of operation or characteristic performance.

Appellants first referred to the prior art “generally” and thereafter argued invalidity specifically with respect to the prior Detroit air filter, the Farr ’480 patent and the prior patents to St. Cyr and Niestle (French). The remaining prior art patents, including those to Henshaw, Preble, Slausson, Orem, Merryweather, Wood and the British patents to Kirkham, Row and Moller, are referred

to merely as allegedly disclosing *separate elements* of the patent in suit totally ignoring the radical differences that exist between the structures disclosed in these patents, their modes of operation and performance over that of the Farr patent in suit. Of these prior art patents the lower court dismissed the patents to Wood and the British patents to Kirkham, Row and Moller on the ground that they were patents

“* * * in which liquid is supplied continuously or intermittently so as to wash away any dust collected, are not filter panels operating on the principle of impingement of particles on collecting surfaces and do not remove dust by the same mode of operation referred to in Finding 4, * * *” [Finding 10, R. 61.]

In operation of the filter panel of the Farr patent in suit the panel is oiled, and in use the oiled filter operates to collect the dust by impingement action and the art is principally concerned in this type of filter with its characteristics, such as efficiency in removing dust and pressure drop as the filter becomes progressively loaded with dust. Dust, of course, may be removed from air in a great variety of ways. There exists in the prior art, as illustrated by the patents cited by Appellants, a number of devices in which the dust is removed from the air by surfaces continuously supplied with water or other fluid, the dust being collected by the fluid and continuously carried away thereby substantially as fast as deposited. Devices of this type very clearly operate on a different mode of operation, with entirely different results than the Farr filter panel, and, of course, could not disclose or indicate to the art the character or mode of operation to be attained by a device such as the patent in suit where the dust is retained in the panel.

Thus, considering first the Row (British) patent [Deft. Ex. B, Tab 13] while this patent discloses a device stated to be made out of sheets of perforated metal or woven wire which are corrugated [R. 429], the filters of this panel are provided with a chamber at the top of the plates and a collecting chamber at the bottom of the plates for the delivery of water [R. 434] and the water is the thing that cleans the air.

“The Court: * * * In other words, is the water the cleaning agent in this device or is it the plates?”

The Witness: Well, it is the water that is on the plates that is the cleaning agent. * * *.” [R. 437, 438.]

As shown on Plaintiff’s Claim Chart [Ex. 32] for example considering Claim 4 [R. 986] this patent is therefore not an impingement filter operating to collect particles on a collective surface—the water collects and washes away the dust. It does not subdivide a panel in both dimensions [R. 763]; it does not have the mode of operation of the Farr filter panel as there is no progressive loading of the panel with dust.

The British patent to Kirkham [Deft. Ex. B, Tab 12] is a device intended for washing and scrubbing gas, not for a device for collecting dust by the impingement system [R. 423]. The patent discloses but one section of a rotor device which is intended to rotate in a liquid tank [R. 425]. While it is disclosed as made out of corrugated sheets some of which it says may be wire gauze, in practice the device is rotated in a tank so as to be dipped in water [R. 426], the channels of the corrugated plates being occupied with water. In connection with Plaintiff’s Claim Chart [Ex. 32] it is to be noted that this patent

does not disclose a filter operating on the principle of impingement of particles on collecting surfaces and does not have the mode of operation of being progressively loaded or include any of the elements 1, 3, 6, 7 or 8, for example of Claim 4 of the patent in suit [R. 766].

Similarly, the British patent to Moller [Def't. Ex. B, Tab 14] discloses a number of corrugated plates carried by a link chain which rotates in a pan of water [R. 453]. While the plates on this link chain are corrugated so as to have troughs or pockets, the patent points out that these are "for scooping up the wetting liquid" [R. 455], so that these troughs are occupied by water as the device goes to the top [R. 455, 456]. While Appellants' witness Russell testified that this device might be made out of fly screen he would not even venture an opinion as to how long the device would last so constructed [R. 457]. Plaintiff's Claim Chart [Ex. 32] shows, for example, in connection with Claim 4, that this patent is not an impingement filter, does not have the mode of operation of the Farr filter panel in becoming progressively loaded with dust, and does not include elements 1, 3, 6 and 8 of the patent in suit [R. 767, 768].

The Wood patent [Def't. Ex. B, Tab 11] Figures 1 to 11, inclusive thereof, again shows a device made of solid corrugated plates [R. 420]. These are operated in connection with a liquid bath [R. 421].

The lower court in its memorandum opinion properly dismissed from consideration the prior art patents to Wood, Kirkham, Row and Moller [Def't. Ex. B, Tabs 11, 12, 13 and 14] by stating:

"As to the other patents here that involved washing, it seems to me that it is an entirely different use, a different object, * * *.

In all of the cases involving water the air is washed and they do not operate upon the impingement theory. They might impinge for a moment, but they are immediately washed off. So I do not think any of those anticipate completely the elements of the claims of any of the four claims in suit here." [R. 819.]

The prior art patents to Henshall [Def't. Ex. B, Tab 2] and to Merryweather [Def't. Ex. B, Tab 7] are two of the patents cited by the Patent Office in the prosecution of the application for the patent in suit. Neither shows a filter panel approximating the construction of the patent in suit and neither shows a filter panel operating like or capable of a performance similar to that of the patent in suit.

In the Henshall patent the filter is made using a number of angled perforated plates. These angled plates provide channels between for the flow of air. They are not made of screen wire and the perforations in the different section of the plate are graduated in size, the larger being in the front section and the smaller at the rear section [R. 375]. The Henshall device makes no division of the air stream whatsoever in a horizontal direction and therefore lacks the multiple subdivision of the panel [R. 744, 745]. Since these channels extend without any interruption horizontally across the filter, the air stream is not broken up into the maze of small air filaments which is so essential to the characteristic performance of the Farr filter panel. Thus if the 20 x 20 panel was made following the Henshall design with the plates spaced apart with the spacing of the Farr filter panels there would be only 78 channels in the Henshall patent extending horizontally from one side of the filter

to the other as compared with substantially 6200 divisions of the Farr filter panel [R. 745, 746].*

The Merryweather patent is even less pertinent. This discloses a panel containing merely a set of diagonally disposed wire screens having large channels between them each extending completely horizontally across the filter. There is thus no multiple subdivision of the panel in two dimensions as is necessary for the performance of the Farr filter panel in suit [R. 753].

When these patents were cited by the Patent Office Examiner it was pointed out that there was no division of the air passages of the filter in either of these patents in a horizontal direction [R. 919-922]. It is there pointed out that in a 20 x 20 panel in these patents there would be only 76 air passages against substantially 6200 for the Farr panel [R. 921, 922].

Appellants made no attempt to establish that either the device of this Henshall or the Merryweather patents would have the performance and characteristics of the Farr patent in suit. Appellants' witness Russell admitted that he had never seen any filters constructed in accordance with these patents [R. 377]. Plaintiff's Claim Chart [Ex. 32] clearly shows that these patents do not include the combination of the patent in suit [R. 752, 753].

The Orem patent [Deft. Ex. B, Tab 6] has no resemblance either in structure or mode of operation to the Farr patent in suit. It consists essentially of a number of concentric screens providing a plurality of annular spaces which are connected together to provide a *single* passage for air through the filter [R. 397, 752]. This is to be

*The record states 62000 rather than 6200 divisions but 78 squared is 6184, *i. e.*, about 6200.

contrasted with the construction of the patent in suit whereby some 6200 passages are provided [R. 751, 752].

The prior art patents to Preble [Def't. Ex. B, Tab 4] shows the filter made of three sections, a central section formed of stacks of expanded metal and two end sections having a plurality of wire screens set as in the old Air-Maze Type A or Type B filter so that the air flows perpendicular to the screens. This patent does not combine the elements of the patent in suit or have anything simulating the mode of operation of the patent [R. 747-750]. The casual instructions of the patent are sufficient to justify the lower court's remarks:

"I would not waste any time on it because I do not think it anticipates the combination here. It teaches that there should be these straight screens, both inlet and outlet side." [R. 818.]

No attempt was made at the trial to establish any of the above prior art patents possessed the novel characteristics of the Farr patent. No attempt was made to establish that any one of these patents would give high efficiency combined with a low pressure drop which rises slowly. None of these prior art patents show in combination (a) a corrugated wire screen positioned parallel to the flow of air; (b) the corrugations dividing the air stream horizontally and vertically in a multiplicity of small passages, and (c) angles into the passages resulting in a filter in which the air flows mainly through the mesh until the passages become loaded with dust. The only other prior art patents using wire screen in an impingement filter is the Greene patent under which Air-Maze manufactured their Type A and Type B filters. In this patent the filter has no passages except through the mesh of the screen. Appellants have made no honest ef-

fort to refute the Findings of the trial court as to the novel and surprising new results of the filter panel of the Farr patent in suit. The Farr patent clearly discloses a new patentable combination of elements with a very surprising new performance in filtering dust in no way suggested by the prior art.

The Detroit Paper Filter.

Appellants assert that the patent in suit is invalid in view of the Detroit paper filter but not on the ground that the Detroit paper filter discloses the Farr air filter panel, or its mode of operation, or the characteristic performance of the Farr patent. Appellants must concede that the Detroit air filter has a different physical construction, a different mode of operation and entirely different performance characteristics. The basis of appellants' assertion is that if one had substituted wire screen for the paper of the Detroit filter a filter would have been produced having substantially the same physical construction, mode of operation and characteristics of the Farr patent in suit. Appellants contend that this substitution would not have required invention notwithstanding the expressed findings of the lower court to the contrary, which it is believed are supported overwhelmingly by the record.

The prior art patents to Kaiser [Deft. Ex. B, Tab 8] and Manning [Deft. Ex. B, Tab 9] describe and illustrate the Detroit air filter. Grouped with these patents may be considered the Slauson patent [Deft. Ex. B, Tab 5] which is another form of a solid wall filter described as made of wool felt or cotton cardboard [R. 393]. Grouped also with these patents is to be considered the patent to Wood [Deft. Ex. B, Tab 11], particularly Figures 12 to 15 thereof, which shows an air filter made of solid metal corrugated sheets [R. 420].

Paper filters of the type shown in the Kaiser or Manning patents are made of corrugated paper with no bend or angle in the corrugations [see, for example, Figure 1 of the Kaiser patent, R. 1022] but the practice has been to employ two sections in tandem as illustrated in Figures 5 to 7 of the Kaiser patent [R. 1022], or as illustrated in the Manning patent, Figures 2 or 7 [R. 1026] with the corrugations of the different sections at an angle thereto.

Appellants' suggested modifications of the Detroit filter panel amounts to a change not only in the material of the construction of the Detroit air filter but a change in the Detroit filter from one having solid wall passages to one having passages made with mesh material open for the circulation of air through the mesh. It is a change which introduced an entirely different mode of operation than that possessed by the Detroit air filter and it is a change which would produce an entirely different performance. In the Detroit air filter the passages are defined solely by grease-covered paper walls. There is no opportunity for the circulation of air through these walls [R. 197] so that the filtering efficiency and performance of the Farr filter panel, which is dependent thereon [R. 128] cannot be achieved. The art had before it no information which would suggest that any benefits or advantages would be obtained by constructing the Detroit air filter panel from wire screen.

The lower court made a direct Finding that the Farr filter panel was not obvious from the prior use of paper filters and the prior use of filters using wire screen [Finding 14, R. 63]. The record in support of this Finding is believed conclusive. On this issue we call the Court's attention to the following uncontroverted facts:

First, the Detroit air filter has been on the market since 1932 by the Detroit Air Filter Company and its predecessors in interest [R. 330]. The Greene patent under which Air-Maze manufactured issued in 1925, and the Air-Maze Type A and Type B filters had been on the market for undoubtedly a greater period of time.

Second, these filters are sold mainly to people of high technical training, such as the engineers or architects designing ventilating systems or the intakes to engines [R. 258, 259, 278].

Third, it was a known fact in the industry that the Detroit paper filters, while giving a low rise in pressure drop with a dust load, were 7 to 10% less efficient in removing dust than filters of screen wire, such as the Air-Maze Type A or Type B filters [R. 330].

Fourth, these filters, the Air-Maze Type A and Type B and the Detroit air filter, along with all other commercially known filters, were given side-by-side tests by the art, as demonstrated by the publication of the Association of American Railroads [Pltf. Ex. 27], and the engineers noted the radical difference in performance of these and the defects of each, and found no suggestion from this side-by-side testing of the invention of the Farr patent in suit [R. 821].

Fifth, the art was experimenting at all times seeking to find a better form of air filter. Prof. Rowley testified that he had twenty-five years' experience in this field in testing filters and in research and development work pertaining to filters [R. 478, 479].

Sixth, immediately after the filter panel of the Farr patent in suit was developed, it went into commercial use and in a few short years, without money or resources, notwithstanding the well entrenched position of powerful

competitors, the Farr filter panel business was built up to one of major importance in the field.

Seventh, the new characteristic performance of the Farr filter panel in suit compelled the art to meet the competition. Air-Maze found it necessary to make its substantially infringing copy of the patent in suit in order to have a filter panel with the high efficiency and low pressure drop rise characteristic of the patent in suit.

The lower Court heard the evidence and in its memorandum opinion given at the end of the trial summarized the situation as follows:

“Another thing that strikes me in that connection was the very exhaustive and painstaking study made by Professor Rowley for the Association of American Railroads, and his report—I do not recall the evidence as to when it was completed—but the report of the railroads bears the date of 1938, and as I recall I believe he said he conducted the experiments within the previous year. As a result of that study no suggestion was made for the substitution of wire gauze, for instance, for paper, such as is disclosed in the paper filter on file here—I have forgotten the name or the number of the patent. I believe that was the Kaiser patent?”

Mr. Leonard S. Lyon: Yes, your Honor.

The Court: Moreover, the mere fact of that exhaustive study made by Professor Rowley would indicate that the industry interested in the matter of air conditioning or air cleaning or air filters was going to great pains and great lengths and spending a great deal of money and doing it scientifically in order to find what apparently the plaintiff put together here in a combination, a successful and novel and useful invention.” [R. 821, 822.]

In view of the rule that the Findings of Fact of the lower Court are not to be set aside where they are supported by substantial evidence, we do not see how there can be any issue before this Court as to the fact that the patent in suit was not a mere obvious substitution of wire screen for paper in the Detroit air filter. No rational explanation can be offered for the failure of all the skilled and scientific men who investigated air filters to have produced the Farr filter panel even though they had before them the Greene patent and the Detroit air filter on side-by-side tests unless one accepts the Finding of the lower Court that invention was actually involved. No explanation can be presented for the fact that the art suffered for years with the problem of having either to use a filter of low efficiency—the Detroit air filter—or a filter of high efficiency which had a rapid rise in pressure drop when loaded with dust. No other explanation is available for the marked commercial success of the Farr filter panel in suit immediately upon its introduction into the art, such as necessitated the Appellant Air-Maze Company copying the same, except that it represented a real invention in the art.

Prior Art Patents Specifically Relied Upon by Appellants.

Appellants' difficulty in finding in the prior art any air filter panel which combined the elements of the Farr filter panel in suit or possesses the mode of operation of the Farr patent in suit, or is capable of achieving the new and surprising results of the Farr patent in suit is emphasized by the character of the three specific patents selected by Appellants for detailed discussion in comparison with the Farr patent in suit. These three patents are the Farr '480 patent, the St. Cyr patent and the Niestle (French) patent.

The Farr '480 Patent: Appellants contend that the patent in suit is invalid over the Farr patent on the humidifier. In making this contention Appellants overlook the fact that the Farr '480 patent relied upon is not prior to the patent in suit and that the disclosure is, therefore immaterial to the patent in suit. Morrill N. Farr is the inventor and patentee of both the patent on the air filter No. 2,286,479 here in suit [Pltf. Ex. 1; R. 839] and Patent No. 2,286,480 [Deft. Ex. B, Tab 10; R. 987]. Both patents issued on the same day, the patent in suit on the air filter panel having the lower patent number and issued on an application filed earlier than the application for '480 patent. The original application for the patent in suit was filed on July 22, 1939, whereas the application for the '480 patent was filed on July 1, 1940. Appellants in their brief rely on the fact that commercial sales of the device of the '480 patent were made on November 19, 1937 (App. Br. p. 12), but such sales were less than two years earlier than the filing date of July 22, 1939, of the original application for the Farr patent in suit. Rev. Stat. 4887, then in effect, provided two years from the first public use of the invention to file an application for patent. The present statutes, which limit the period to one year, was not enacted until August 5, 1939, and did not go into effect until August 5, 1940 (35 U. S. C. A., Sec. 32, 53 Stat. 1212).

Appellants are in the impossible position of having to contend on the one hand that such sales of the humidifiers do not establish a date of invention by Farr of the filter panel in suit (for the purpose of confining the date of invention of the patent in suit to July 22, 1939) and on the other hand argue that the invention of the Farr filter panel was embodied in such humidifiers. Obviously both contentions cannot be correct. If the inven-

on of the Farr filter panel in suit is embodied in the humidifier screen it was made at least as early as the date such screens were sold and the patent in suit was filed within the statutory period. If it was not embodied therein then, of course, the '480 patent is immaterial to the validity of the patent in suit.

Actually the evidence clearly shows that the humidifier of the Patent '480 was neither identical in construction, mode of operation or performance with the filter panel of the patent in suit. The '480 patent shows a large cylinder rotor made up of corrugated wire screens and flat wire screens. A photograph of the screen of the commercial rotor is in evidence as Plaintiff's Exhibit 26. This rotor is attached to a motor marked "13," (Figure 1) which causes the power portion of the screen to rotate continually in a basin 14 which carries a water bath therein. The device is utilized for the purpose of humidifying and cooling air [R. 757-761]. It rotates sufficiently rapidly that it is wet with water and water continually moves downward, or as the lower Court said "trickles" [R. 760]. The air is contacted not with oiled wire surfaces but by the water and if there is any dust removal in such a device it is by the water which catches the dust and carries it down to the water bath [R. 757]. Physically this device differs from the Farr patent in suit in being a rotor rather than a panel. It only has one set of crimped wires; it has no bend in the corrugations. The fact that the material is wound spirally does not substantially change the direction of the passages. This is the same contention as made in connection with the St. Cyr patent and fully discredited by the photograph Plaintiff's Exhibit 26 [R. 975].

Plaintiff's chart, Exhibit 32, clearly shows that the claims of the patent in suit do not include the humidifier

of the '480 patent. It is not a filter panel operating on the principle of impingement of particles on collecting surfaces—the dust is caught by water which trickles down with the dust to the water bath. It has no change in direction of the passages as defined by the claims [Ex. 29]; it certainly does not have the mode of operation or the progressive loading of the patent in suit [R. 757-760].

The St. Cyr Patent: The St. Cyr patent is described in the patent itself as

“* * * a device for mixing vaporizing liquid fuels and the object thereof is to provide simple and efficient means for rapidly and perfectly vaporizing and mixing the fuel.” [St. Cyr Patent, R. 989, p. 1, col. 1, lines 8-12.]

The intended purpose for using this device is shown in Figure 1 of the St. Cyr patent [R. 989] wherein the patent teaches the insertion between a carburetor 2 and the engine 3 of certain corrugated and rolled “fine metal gauze.” So used the purpose of the device is to catch any droplets of gasoline fuel carried along with the air from the carburetor 2 and retain these in contact with the air until they can be evaporated [see testimony of Appellants' expert Russell, R. 366, 367]. The statement in Appellants' brief (p. 50) that the “St. Cyr device was obviously intended to be used in the air intake of the carburetor * * *” is clearly contrary to the expressed disclosure of the patent in suit or all of the evidence in the record. It is not to be used in the intake to the carburetor but rather on the exit side of the carburetor and between it and the manifold [R. 370].

Physically the construction of the St. Cyr device differs radically from the patent in suit. While the patent in

suit is a panel formed of a plurality of sheets of crimped mesh screening members (Claim 5) the device of the St. Cyr patent consists of a single sheet of fine wire gauze having corrugations. This single sheet is rolled up to form the filter. The single sheets employed before they are rolled up are either of the form shown in Figure 5 or Figure 8 of the St. Cyr patent [R. 989]. The corrugations of these sheets have no angle or bend therein and are widely spaced apart. As illustrated in Figures 5 and 8 these corrugations are totally devoid of any angle. Appellants, while conceding that the single sheet of corrugated fine wire gauze of the St. Cyr patent has straight corrugations without an angle, asserts that by the process of winding the sheets they are given a gradual change in direction and for this purpose introduced two exhibits of wound corrugated wire [Deft. Exs. V and W].

This is the same contention that was made, as we have shown, in connection with the spirally wound screen used in the Farr '480 patent and as we have shown in connection with that patent, while winding of the strip may induce a slight spiral angle in the valleys of the corrugations, the passages are substantially straight as proven by Plaintiff's Exhibit 26 [R. 975] which is an actual photograph of the commercial production of the Farr Company's humidifier screens with straight crimps or wound spirals. As clearly shown from that exhibit the passages are substantially straight [R. 975].

The material used in the St. Cyr patent is said to be "a strip of fine metal gauze." On direct examination Appellants' expert Russell testified that the words "wire gauze" included any wire screen between 14 and 200 mesh [R. 372]. On cross-examination he was interrogated

with respect to materials employed in the carburetor art and then testified that such material might be 60 or 70 mesh:

“The Court: It is a very fine mesh?

The Witness: Quite fine, sir.” [R. 471.]

The word “gauze” is derived from the textile industry meaning something of very fine construction and it is clear that the St. Cyr device was made out of such a fine mesh material that if coated with oil the oil would fill the openings of the gauze so as to present a solid wall [R. 740, 741]. As pointed out hereafter more specifically under the Niestle (French) patent, that patent also refers to fine gauze and that patent directly teaches that when coated with oil all of the openings in the screen are closed by the oil [R. 459]. While the patent in suit does not specify any size for the mesh of the wire screen employed it does very clearly bring out that after oiling and being placed in use the openings of the screen wire are open for the passage of air and this is made an element of the claims. For example, Claim 4 in defining “mesh members” requires that

“* * * the medium may flow through the mesh of said members.”

If an attempt were made to use the St. Cyr device as a dust filter in place of merely as a device for mixing gasoline vapors with air as the patent teaches, it would provide solid wall passages [R. 741]. Clearly the St. Cyr patent does not employ the physical elements or mode of operation of the Farr filter panel in suit as defined in the claims in issue [R. 740, 742]. The lower court in its Memorandum Opinion clearly correctly finds that it was not an air filter panel; that it was a device

applied by fluid rather than an impingement filter; that it did not have the mode of operation and could not give the performance of the filter panel in suit [Memorandum Opinion p. 820, Finding 12, R. 62]. The Findings of the lower court are in accord with those of the Patent Office Examiner and are clearly sustained by the record.

The Niestle (French) Patent: The Niestle (French) patent [Deft. Ex. B, Tab 15] discloses a filter which is not constructed in accordance with the Farr patent in suit and does not have a mode of operation similar hereto. The air filter panel of the Niestle patent is made of expanded metal sheets. In the drawing of the Niestle patent and in the major form of the device of the patent these expanded plates are solid sheets of metal. The patent does suggest, however, that "numerous modifications may be made * * * in particular, according to one embodiment the elements * * * are cut out and pressed in a metal gauze 6." [R. 1072, 1073.]

Three alleged models of the Niestle device have been introduced in evidence by defendants. These include Defendants' Exhibit DD, identified by Russell as made of 16 mesh screen [R. 466]; Exhibit LL tested by Professor Rowley, which is made of 30 mesh screen [R. 10], and Exhibit YY tested by defendants' engineer Brown made of 16 mesh screen [R. 696]. These models may be helpful to the Court to enable the Court to understand how sheets of material which are set perpendicular to the direction of flow can, by a process of expanding metal, form openings but they do not correspond to the Niestle patent with respect to the wire screen from which they are composed. The Court on examination of these models will perceive at once that they are not made out of sheets of material arranged parallel

to the intended flow of air [R. 769]. It is only by alignment of certain punched-out openings of these sheets that any passages are provided for the flow of air through the panels. When one attempts to expand screen wire to make punched-out sections the material is so flimsy (even if heavy 16-mesh wire screen is employed) that it is impossible to obtain realignment of the punched-out section of successive sheets without employing a process of soldering at each punch-out section [R. 465], and all of the alleged models of the Nistle patent introduced here are soldered together in order to maintain the punch-out sections in alignment [R. 465, 771].

The Nistle patent in describing the use of wire gauze as a substitute for solid metal plates, states both in the specification and in the claims that:

“The meshes of the metal gauze may be fine enough for the liquid, such as oil, applied thereon to fill the meshes by capillary action and form a continuous, thick film of oil * * *.” [R. 1073.]

Appellants' expert Russell was compelled to admit that the teaching of the Nistle patent was that the openings in the gauze should be small enough so that when dipped in oil they formed a solid plane.

“The Court: Does it or does it not state that the openings in the gauze should be small enough so that when dipped in oil they form a solid plate composed of the screen and the oil filling the holes?”

The Witness: As described there, it does.” [R. 459.]

At the trial Professor Rowley introduced evidence of his test on the alleged model [Ex. LL] of the Nistle patent. Although Professor Rowley testified that this model was representative of the teachings of the French

patent [R. 507 and 508] this testimony, of course, came after the knowledge of the Farr patent in suit and the Appellants' P-5 filter. In making this model he used a 30-mesh screen wire [R. 510] which is a much finer wire than the 16-mesh utilized in the production of the other alleged Nestle models, Defendants' Exhibit DD or Defendants' Exhibit YY. The 30-mesh wire hardly corresponds to the requirement of the Nestle patent that wire gauze be employed. It was admitted by Rowley that in his tests the oil did not occupy the openings [R. 521]. We have previously contrasted the results of Professor Rowley's tests on this alleged Nestle Model, Defendants' Exhibit MM [R. 1076] with the similar tests performed by Professor Rowley on the Farr patent in suit and on Appellants' P-5 filter. A mere inspection of this exhibit shows the extreme high pressure drop and extremely rapid rate of pressure rise to dust load. Exhibit YY departs even farther from the Nestle patent in the use of the very open 16-mesh screen wire, the openings of which were not closed during test. None of the tests performed by Appellants on the alleged Nestle models indicate any performance similar to that of the patent in suit. The test of Exhibit DD gave a rapidly rising pressure drop. The test of Exhibit YY gives a poor filtering efficiency.

It requires but a simple comparison of any one of the claims of the patent in suit with the Nestle patent to demonstrate that this patent does not anticipate the claims in suit. Physically the Nestle device is entirely different. The claims call for sheets of mesh material of wire screen *parallel* to the direction of air flow. The Nestle sheets are perpendicular. The claims call for the passages being formed by these parallel sheets or

the corrugations therein, whereas the only passages formed in the Niestle device are by punched-out sections. There is an enormous manufacturing problem presented as evidenced by the necessity of soldering each sheet to adjacent sheets [R. 771, 772].

It was these physical differences which the lower court had in mind in its Memorandum Opinion relative to the Niestle patent as follows:

“I do not just mean cleaning air but all of the things that must be taken into consideration in the manufacture and sale and use and cost and maintenance and upkeep of air filters.” [R. 821.]

The Proceedings on the Farr Application Contained No Abandonment or Estoppel but Instead Indicated an Expressed Intent of Both Farr and the Patent Office to Cover Filters Omitting Flat Screens.

The Farr patent in suit issued on an application filed April 4, 1940, Serial No. 327,833 filed as a continuation of an earlier and then copending application Serial No. 285,904 filed July 22, 1939. This earlier and copending application disclosed forms of the Farr filter panel which included no flat wire mesh screen. Appellants contend that because of the filing of the continuation application for the patent in suit without expressly disclosing air filter panels omitting the flat screens, and because of the rejection of Claim 6 of the earlier application, the patentee Farr either abandoned or is now estopped to have Claims 4, 5, 7 and 8 in suit construed so as to include filter panels omitting a flat screen.

To the contrary there is no abandonment or estoppel created merely because the inventor had filed his original

application showing several forms of his invention and then later substitutes therefor a continuation application in which he illustrates only the best form of his invention. The scope of an application is determined not by the drawings of the application but by the claims of the application. When the continuation application was filed the claims of that application demonstrated that Farr had no intention of abandoning those forms of his invention which omitted the flat screen and the subsequent prosecution of his continuation application demonstrates that Farr intended to secure and the Patent Office Examiner intended to grant claims of a broad enough scope so as to include filter panels such as the Air-Maze accused P-5 which employed no flat wire screen.

The original Farr application Serial No. 285,904 [Pltf. Ex. 1-B, R. 939-955] disclosed in Figures 1 to 4 of that application an air filter panel composed of crimped or corrugated wire screen. There were no flat wire screens employed and the corrugations of alternate crimps inclined in opposite directions, as more particularly illustrated in Figure 3. There was no bend in the corrugations and the passages formed by the corrugations did not change in direction. In Figures 5, 6 and 7 of Application Serial No. 285,904 there is shown a form of the invention in which between each bend of corrugated wire screens there is placed an additional strip of flat screen, and in Figures 8 and 9 of the application there is shown a form of filter in which the corrugations or crimps of the wire screen were angled, *i. e.*, were made in the same herring-bone shape as in the patent in suit. While the description of Figures 9 and 10 of the Application Serial No. 285,904 did not describe directly whether or not any flat wire

strips are to be employed between the corrugated strips the obvious inference from the previous disclosure is that the herringbone type of crimp or corrugated strip could be employed either as indicated in Figures 1 to 4 without employing any flat wire screen or as shown in Figures 5, 6 and 7 where the flat wire screens were employed.

Comparing the disclosure of Application Serial No. 285,904 with Appellant's P-5 filter it will be seen that all appellants have done in constructing this P-5 filter is to follow the disclosure of Application Serial No. 285,904 as to the omission of the flat wire screen and utilized a crimped wire screen having two bends rather than one. The proceedings on the continuation application Serial No. 327,833 demonstrates conclusively that this form of device was intended to be covered by the Farr patent in suit. Examination of the patent in suit will show that it contains Claims 1, 2, 3 and 6 (not here in suit) which claims are in specific language limited to a filter panel composed of alternate layers of "crimped and uncrimped mesh members packed together." This language is obviously intended to confine these claims to that form of the Farr filter in which between each alternate layer of crimped or corrugated wire screen there is placed the uncrimped or flat wire screen. The claims of the patent in suit, however, Claims 4, 5, 7 and 8, refer only to the employment of corrugated or crimped wire screens.

From the outset of the proceedings on the filing of this continuation application up until the grant of the Letters Patent in suit the proceedings show that Farr was at all times cognizant of the fact that his invention could be embodied in either a filter omitting the flat screens or one using the flat wire screen. As filed the

continuation application contains the following broad claim:

“8. An air filter panel composed of wire mesh screen members, said screen members being arranged to permit the flow of air through the air panel along lines parallel to the planes of the screen of said members, said members being shaped to provide abruptly changing lines for air flow through the panel.”

There certainly is no basis for asserting at present that flat wire screen is intended to be an element of this claim while at the same time the application contained more narrow claims, such as 6 and 7, referring to only alternate screen members being crimped.

At no time during the prosecution of this application did the Patent Office make any distinction in its action as to the patentability of the Farr claims as to whether or not said claims were limited to the flat wire screen. No claim was cancelled during the prosecution of the Farr application until the supplemental amendment appearing in the record at pages 915-924. This amendment was filed after an oral interview by the Examiner and the inventor's son Richard S. Farr and Appellee's expert Duncan [R. 106, 107]. This amendment included the claims in suit which as we have indicated contain Claims 1, 2, 3 and 6 as clearly limited to the flat wire screens and Claims 4, 5, 7 and 8 not so limited. At the interview and in the supplemental amendment in which the previous claims were cancelled it was pointed out to the Examiner that two sets of claims were being prosecuted, one limited to mesh screen members and the other not. Thus, for example, the supplemental amendment reads:

“Considering more particularly the claims now under consideration, claims 18 to 20 are specific to a

filtering panel having alternate crimped and uncrimped mesh members packed together to subdivide the panel into a multiplicity of passages extending through the panel with the passages changing in direction. Claims 21 and 22 are also specific to the angular relationship or change in direction of the passages *but are somewhat more generic in their recitation of the structure of the mesh screen members which compose the filter panel.*" [R. 923.]

Clearly, therefore, Farr never abandoned his efforts to secure claims which were not limited to flat wire screen and the Patent Office Examiner intended to grant claims of such scope.

Equally untenable is the position asserted by Appellants that by cancelling Claim 6 in Application Serial No. 285,904 Farr either abandoned or is estopped to claim a filter panel which omits the flat wire screen. Claim 6 of the original application is not comparable in scope with any of Claims 4, 5, 7 and 8 of the patent in suit. It is not correct to say that said Claim 6 is either broader or narrower than the patent claims. This Claim 6 calls for, among other things, "a series of laminated, intersticed metal strips," for "said strips being laid with said convolutions in diagonally opposite directions," and for "unrestricted diagonally extending passage-ways." Clearly this claim is totally inadequate to define many essential elements of the Farr filter panel. It does not recite the use (as is recited in all the claims of the patent in suit) of "mesh screen members," whereas the record here demonstrates the mode of operation and performance of the Farr filter panel is dependent on the use of mesh screening members. Claim 6 refers to "metal strips." It does not define (as all of the claims in suit define) that the

members, whether strips or wire screen, are positioned in the panel "extending in the general direction of the intended flow through the panel of medium to be filtered," whereas the record here demonstrates that this feature is essential to the Farr panel. It does not recite that the filter panel is provided with passages "the walls of which passages are composed of such mesh members" as recited in the claims in suit. It does not recite that the passages change in direction or are abruptly angled, as specified in the claims in suit, and it does not recite that the strips of material or wire mesh, are arranged so as to "effect a multiple subdivision of the panel" which is an essential element of all Claims 4, 5, 7 and 8 in suit. Thus in all of the respects above mentioned Claim 6 is broader than any of Claims 4, 5, 7 or 8 in suit, whereas in other respects Claim 6 is narrowed than any of the claims in suit.

Claim 6 of Application Serial No. 285,904 calls for strips being laid with their convolutions in "diagonally opposite directions," a practice which may be employed in some forms of the Farr filter panel but is not essential to the invention.

Thus Claim 6 so relied upon by Appellants was totally inadequate to define the invention of the Farr filter panel and was cancelled and other claims substituted therefor not with the intention, as asserted by Appellants, of abandoning the claims due to the omission of the flat wire screen (to which there is no reference in Claim 6) but merely because such claim was totally inadequate to express the invention.

In construing Claims 4, 5, 7 and 8 in suit the lower Court clearly did not construe those claims in such a way

as to make them coextensive with this cancelled Claim 6. Claims 4, 5, 7 and 8 are clearly, in many respects, more limited than this Claim 6 of Application 285,904. The accused P-5 filter panel follows all the specific limitations of Claims 4, 5, 7 and 8 and not the language of this Claim 6 of Application Serial No. 285,904. The accused P-5 filter panel was made using mesh screen wire as provided in the Claims 4, 5, 7 and 8 in suit and not the "metal strips" stated in Claim 6 of Application 285,904. The Air-Maze P-5 filter panel used crimped wire sheets, the crimp providing the "multiple subdivision of the panels." The Air-Maze P-5 filter panel includes passages "the walls of which passages are composed of mesh members" not recited in said Claim 6. The Air-Maze P-5 panels had passages changing in direction or angularly disposed as provided in the claims in suit and do not have the unrestricted diagonal passages to which Claim 6 is limited. Thus clearly Claim 6 of Application Serial No. 285,904 does not show any such an abandonment or create any such estoppel as contended by Appellants.

Appellants' P-5 Filter Is Substantially Identical With the Filter Panels of the Farr Patent in Suit.

The filter panel disclosed in the Farr patent in suit and Appellants' P-5 filter are essentially basically the same. Appellants rely first on the fact that the P-5 panel omits the flat screens. This idea was Farr's not Air-Maze's and consistently throughout the prosecution of the Farr patent in suit Farr intended to cover filters without the flat screens. Appellants next urge that in the patent in suit the corrugations of all the screens are parallel, whereas in the P-5 filter panel the alternate corru-

gated screens are laid in opposite directions. Here again Appellants are anticipated by Farr, who fully appreciated that the screens could be laid either way, and the evidence establishes that no difference in mode of operation or performance is occasioned thereby. Appellants further urge that in the Farr filter panel there are individual passages running from the front to the back of the filter. Identical passages are provided in the P-5 filter. The passages of the patent in suit are merely the valleys provided by the crimps. Identical valleys are in the P-5 filter panel. Air-Maze has recognized the existence of such passages. These passages will be found identified in the Air-Maze catalog on the P-5 filter [Pltf. Ex. 4]. On page 2 of that catalog will be found the following sentence:

“Air enters crimped layers of galvanized wire mesh at 180°. ‘Z’ shaped channels provide large areas for dirt storage with minimum impedance to air flow.”

Below this statement there is a perspective view of a section of one of the Air-Maze crimped sheets identified by an arrow in the passages and the statement in the catalog reads:

“Arrows show how more than a million tiny openings plus *three changes of air flow*, remove dirt from air stream and deposit it evenly on viscous-coated wire baffles.” (Italics from catalog.)

Appellants make many contentions with regard to alleged difference in structure between their P-5 filter panels and the filter panel of the Farr patent in suit. Actually they are all variations of the same theory that the patent in suit must be limited to a filter having a flat screen. There is no question but that the Air-

Maze P-5 filter panel is an exact copy of the Farr invention. A great deal of time was spent at the trial by Appellants merely to prove the fact that in the Air-Maze P-5 panel, because of the omission of the flat screen, the air passage of the valley of one crimp crosses over and is in communication with a number of air passages of an adjoining wire screen. This, of course, is equally true in the forms of the Farr filter which omit the flat sheet, and the evidence demonstrates that there was no difference in mode of operation effected thereby or any change in the performance of the filter. The air which is within one of the valleys of the P-5 crimped sheet to pass into the valley of an adjoining sheet must change in direction [R. 241]. There is nothing in the record which would sustain any finding how any difference in mode of operation or results were obtained by the Air-Maze P-5 filter panel over that of the Farr patent in suit.

Appellants also point out the fact that in the proceedings on the Farr application the passages are referred to as "substantially triangular." The passages in the Air-Maze P-5 filter were also substantially triangular. Of course, when one triangular passage passes over another triangular passage the two passages together form a section of diamond shape. Professor Rowley testified concerning the P-5 filter:

"* * * As you start out with a triangular section near the entrance side, it runs into sort of a triangle and a rectangular section where it is enlarged. Then it comes down again to a triangular section where it is making a bend, where it comes across the trough the second time, and it alternates down between the larger sections which are made up really

of two triangular sections, at right angles to each other, and the smaller sections which are triangular.
* * *” [R. 555.]

Appellants further urge as a difference in structure that in the Farr filter panel the passages change in direction and assert there is no such change in the P-5 filter panel. This contention is answered simply by referring the Court to Exhibit 4 where in the Air-Maze catalog on page 2, the lower right-hand corner, will be found a drawing of the passages of the Air-Maze P-5 filter panel and with the statement in italics in the catalog that such panel includes “three changes of air flow.”

No attempt is made by Appellants to establish that there is any difference in function or performance between the P-5 filter panel and that of the Farr patent in suit. Principal reliance of Appellants in their argument of noninfringement is predicated upon the use in the patent claims of language calling for a “multiple subdivision of the panel in both dimensions perpendicular to the general direction of flow of medium to be filtered.” While this language does not appear in the specification to the patent, that the language is clear and definite is established in the trial by the testimony of appellants’ expert Russell [R. 360]. This language means simply that the face of the filter panel is divided both in the horizontal and vertical direction into a multiplicity of small passages and no witness at the trial testified that there was anything indefinite in this language. To provide multiple subdivision one requires only the corrugated sheets and does not require the flat sheets. The flat sheets obviously can divide up the panel only in the vertical direction. These flat sheets run only horizontally [R. 127]. The only means illustrated in the patent in suit for dividing

the air stream in the horizontal direction is the corrugations of the corrugated sheets [R. 127].

To clearly illustrate how the P-5 panel is subdivided in two dimensions Appellee's expert Duncan made a plastic cast of the medium of the P-5 filter which was then sawed into three pieces [R. 168]. The thin piece identified as Exhibit 15-A shows how the alternate corrugated screens contact each other and completely segregate the different passages from each other thereby effecting a subdivision in both dimensions [R. 169]. Appellants' expert Rowley conceded on the stand that there were about five points of contact between the crimps of one screen and the crimps of an adjacent layer [R. 539]. At such obstruction point the panel is divided in two dimensions [R. 244].

We have previously referred to the fact that the test data, including both those submitted by Professor Duncan and those submitted by Professor Rowley, show that the Air-Maze P-5 filter panel and the Farr filter panel are substantially identical with respect to efficiency and pressure drop and to change in efficiency and pressure drop with increasing dust load. In both filter panels there is substantially no difference in performance or in mode of operation [R. 173].

In its Memorandum Opinion the lower court stated:

"But essentially it seems to me, after studying the devices and seeing them here and hearing all of the expert testimony, that they are essentially and basically the same idea." [R. 822.]

The Findings of Fact 19, 20, 21, 22 and 23 of the lower court are fully sustained by the record here and lead necessarily to the conclusion that Appellants' P-5 filter panel is an infringement of the patent in suit.

ARGUMENT.

The Defense That the Farr Patent Is Invalid as an Unpatentable Combination of Old Elements.

The basis of appellants' contention that the combination of elements of the patent in suit is not patentable is the alleged failure of the elements of the patent in suit to perform any new or different function or produce any new results of unusual or surprising consequence. Appellants rely primarily on the recent decision of the Supreme Court in *Great A. & P. Tea Co. v. Supermarket Equipment Corporation* (1950), 340 U. S. 147, 95 L. Ed. 162, together with the decision in this Circuit of *Himes v. Chadwick* (1952), 199 F. 2d 100, and the decision of the Sixth Circuit in *United Specialties Co. v. Industrial Wire Cloth Products Corp.* (1951), 186 F. 2d 426. As stated in the *Great A. & P. Tea Co. v. Supermarket Case*, 340 U. S. at 151, 95 L. Ed. at 166:

“The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.’ * * * This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned,
* * *”

In the *Himes v. Chadwick Case* this Court said, 199 F. 2d at 106:

“The test is whether the unification of the elements brought into the combination produces ‘unusual or surprising consequences.’ *A. & P. Tea Co. v. Supermarket, supra*; *Packwood v. Briggs & Stratton Corp., supra.*”

The cases relied upon by Appellants are all cases where the sole novelty asserted for a combination of elements resided merely in the dimensions or number of parts which resulted in no new or different function or no new result or unusual or surprising consequences. Thus in the *Great A. & P. Case* the sole alleged novelty was “only an extension of the counter.” This extension was not “mentioned in the claims, except perhaps, by a construction too strained to be consistent with the clarity required of claims * * *.”

In the *Himes v. Chadwick Case* the novelty of the carton box claimed over a single prior art patent to Berkowitz resided in “extensions or flaps from each of the four sidewalls * * * as distinguished from the utilization * * * of flaps from only two sidewalls.” And another prior art patent to Filmer disclosed the utilization of four flaps instead of two. This Court stated 199 F. 2d at 106:

“Thus Parks is no more than a combination of the disclosures of Berkowitz and Filmer.”

This combination produced no new result of unusual or surprising consequences.

In the *United Specialties Co. Case* the sole novelty of the liquid washing type filter of the patent in suit was the extension of a baffle over the sump to reduce the oil spray. Baffles were old in the art and there was no new result of unusual or surprising consequence.

This is not a case where the Farr patent in suit depends for its novelty merely upon the change of one of the elements of an old combination without any new results or any results of unusual or surprising consequence. The Farr filter panel achieved a new and unusual

and surprising result of combining the ability to provide high efficiency in removing dust from air with a lower pressure drop than previous commercially built filters, which pressure drop does not rise as rapidly as previous filters. This was Finding 4 of the lower Court and other Findings, 10 to 14, will show that this new and surprising result was not possessed by any of the prior filters.

This new result is an entirely surprising unusual and unpredictable result. Despite the known knowledge of the art that wire screen filters, such as the Air-Maze Type A and Type B filters, gave comparatively high efficiency but rapid rise in pressure drop with dust load, and despite the knowledge in this art that other filters, such as the Detroit paper filter, gave slowly rising pressure drops but only at the expense of 7 to 10% reduction in filter efficiency, it was not known that both these advantages could be obtained in a single filter.

Not only does the combination of the Farr patent in suit exhibit new functions and new and unusual and surprising results but there is an expressed finding that this combination and the new results were not obvious from the prior art. The record is completely barren of any attempt by Appellants to establish either that there existed any prior art filters or patents disclosing a filter having both the high efficiency and low change in pressure drop with dust load of the Farr filter patent in suit, nor that there was any knowledge by those skilled in the art by which the new results of the Farr filter could have been predicted. It is one thing to hold, as in the cases relied upon by Appellants, that mere extensions of tables, multiplicity of flaps, extension of baffles, etc., with perfectly obvious results give rise to no new patentable combination. But this case is totally barren of any basis for Appellants to assert

that anything in the prior art's knowledge renders obvious the new results of the Farr filter.

See:

Williams Mfg. Co. v. United Shoe Machinery Corp. (1941), 316 U. S. 362, 86 L. Ed. 1537;

American Chain & Cable Co. v. Rochester Ropes, Inc. (C. A. 4, 1952), F. 2d, 95 U. S. P. Q. 115;

Robertson Rock Bit Co. v. Hughes Tool Co. (C. A. 5, 1949), 176 F. 2d 783;

Harris, et al. v. National Machine Works (C. A. 10, 1948), 171 F. 2d 85;

Bianchi v. Barilli (C. A. 9, 1948), 168 F. 2d 793;

Florence-Mayo Nuway Co. v. Hardy, et al. (C. A. 4, 1948), 168 F. 2d 778;

Page, et al. v. Myers (C. A. 9, 1946), 155 F. 2d 57.

These decisions establish the rule that when a new combination or arrangement of known elements produce a new and unexpected result, a patentable combination arises and it is not necessary that this new and unexpected result be new in kind, it is enough that it is new in degree if such an improvement in degree was an unpredictable and unexpected result.

The leading case on this point is *Webster Loom Company v. Higgins, et al.* (1882), 105 U. S. 580, 26 L. Ed. 1177, where the new and unexpected result of the combination was merely a loom capable of producing fifty yards a day where the prior device had been able to

produce only forty yards. In that case it is stated, 26 L. Ed. at 1181:

“It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was, certainly, a new and useful result to make a loom produce fifty yards a day, when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent.” (105 U. S. at 591 cited by this Court of Appeals in *Bianchi v. Barili*, 168 Fed. 2d 793 in sustaining the patent in suit as a combination of old elements merely because it produced raviola with greater rapidity.)

Similarly, the Supreme Court in the comparatively recent case of *Williams Mfg. Co. v. United Shoe Machinery Corp.* (1941), 316 U. S. 362, 86 L. Ed. 1537, sustained as patentable a combination of old elements which produced the new result of permitting the machine to be adjusted in advance so that it would operate in a wide range of different size shoes, stating, 316 U. S. at 367, 86 L. Ed. 1542:

“These findings are to the effect that the new combinations, while they involve old mechanical constructions, combine these in a new way, so as to produce an improved result. These are findings of fact despite the petitioner’s apparent contention to the contrary, and we will not disturb such concurrent findings where, as here, there is evidence to support them.”

The Court of Appeals for the Fourth Circuit in a decision distinguishing the *Great A. & P. Case* sustained a patent on a combination of old elements producing an unexpected superiority residing merely in the ease of more ready handling and longer life, stating:

“It is familiar law that a new combination of old elements, which produces a new result in a manner not obvious to those skilled in the art, is patentable.

(Citing cases.)”

American Chain & Cable Co. v. Rochester Ropes, Inc. (1952), 95 U. S. P. Q. 116, 117.

Other recent cases sustaining patents on combinations which accomplished not necessarily a new result but an old result in a more factual, economical or efficient way are:

Harris, et al. v. National Machine Works (C. A. 10, 1948), 171 F. 2d 85;

Florence-Mayo NuWay Co. v. Hardy, et al. (C. A. 4, 1948), 168 F. 2d 778;

Page, et al. v. Myers (C. A. 9, 1946), 155 F. 2d 57;

Bianchi v. Barili (C. A. 9, 1948), 168 F. 2d 793.

Appellants make no attempt to establish that there exists any prior art having the combined characteristics of high efficiency and low pressure drop with the slow rise in pressure drop. Notwithstanding the findings of the lower court that this constituted a new result, Appellants' brief merely lists the elements of Claim 7 in suit and the specific prior art patents which are alleged to disclose such elements separately. This in no way refutes the findings of fact of the lower court that the patent in suit rep-

resents a new combination. Appellants' process of merely culling from different prior art patents elements of the patent in suit has been repeatedly held to be insufficient to show that a patentable combination is not present.

"It will not do, as appellant tries to do, to cull from one and another of the prior patents elements of the combinations in suit. They must show not that some of the elements are present in the prior patents but that the combination is. The evidence as a whole is not sufficient to overcome the presumption attending their granting."

Robertson Rock Bit Co. v. Hughes Tool Co. (C. A. 5, 1949), 176 F. 2d 783, at 789.

Appellants' Contention That the Patent in Suit May Be Shown to Be Invalid by the Substitution in the Detroit Filter Made of Paper of the Wire Screen of the Greene Patent.

Appellants assert that it would not amount to invention to use wire screen in the Detroit air filter made of paper or cardboard. Appellants assert this is a mere substitution of one well known material for another. As we have shown the issue thus raised is not merely the substitution of one well known material for another; the substitution of material would result merely, for example, in making the Detroit filter out of metal plates rather than paper plates. The use of wire screen is a change not only of material but of structure and results in a device having open mesh walls which leads to an entirely different mode of operation. In the Detroit air filter there is no flow of air through the paper or cardboard walls, whereas in the patent in suit the major flow when the panel is clean is through the mesh of the wire screen with a progressive

increase in the flow of the air down the passages as the openings of the screen become loaded with dust.

Even treating the issue as merely the case of substitution of materials, the decisions clearly demonstrate that the patent in suit must be sustained. The leading case on the law of the patentability of change of materials is the early 1875 case of *Smith v. The Goodyear Dental Vulcanite Company, et al.*, 93 U. S. 486, 23 L. Ed. 952. In that case Goodyear had obtained a patent on the use of hard rubber, a recently discovered compound of known characteristics, as a base for artificial teeth. Various materials had been used for this purpose before but nevertheless the Supreme Court held the patent valid stating that the patentee had done more than merely use "hard rubber to perform the functions that had been performed by other materials, such as gold, silver, tin, platinum or gutta-percha." The Court stated that the result was a new product "differing from all that had preceded it, not merely in degree of usefulness and excellence, but differing in kind, having new uses and properties." (23 L. Ed. at 954.)

The latest expression of law on this subject by the Supreme Court is the recent 1944 decision in *Goodyear Tire & Rubber Company, Inc., et al. v. Ray-O-Vac Company*, 321 U. S. 275, 88 L. Ed. 721. Syllabus 4 in the L. Ed. reads:

"The substitution for a paper casing, in dry cells for flashlight batteries, of a strong metal sheath insulated from both terminals, thereby solving problems of leakage and swelling, involves invention."

In the decision the Court stated:

"Viewed after the event, the means Anthony adopted seem simple and such as should have been

obvious to those who worked in the field, but this is not enough to negative invention. * * * Accepting, as we do, the findings below, we hold the patent valid and infringed.” (321 U. S. at 279.)

If the substitution in a dry battery of a metal case for a paper case can constitute a patentable invention it is difficult to see how in the face of the evidence presented in this record the patent in suit can be held invalid on the ground that it is anticipated by the change of screen wire for paper in the Detroit air filter.

Of particular interest is the case of *Smith Mfg. Co. v. Samson-United Corporation* (C. A. 2, 1942), 130 F. 2d 525. In this case the Second Circuit sustained a patent on an electric fan having flexible blades of a certain shape. The shape of such blades were such that they would not droop when the fan was not in motion (a better sales feature) but they were sufficiently flexible so they would yield when striking any object (a safety measure). The patent was sustained notwithstanding that the prior art showed the use of soft rubber fan blades (which would droop when not in motion) and also fan blades made of metal of like shape to those of the patent in suit.

The leading case in this court is *Oliver-Sherwood Co., et al. v. Patterson-Ballagh Corporation*, 95 F. 2d 70. In that case Sherwood Patent No. 1,416,988 covered the use of soft rubber on bearings and was held valid although the prior art had shown the use of hard rubber bearings.

It is a question of fact to be determined in each patent case whether or not a substitution of a new material for an old one is patentable.

“There is, however, no rule of law that the substitution of a new material for an old is not patentable.

The question is always whether the alteration requires invention or merely the exercise of mechanical skill and judgment.

Remington Rand Business Service, Inc. v. Acme Card System Co. (C. A. 4, 1934), 71 F. 2d 628, 632;

See also:

Lincoln Stores, Inc. v. Nashua Mfg. Co. (C. A. 1), 157 F. 2d 154;

Grant Paper Box Co. v. Russell Box Co. (C. A. 1, 1946), 154 F. 2d 729;

United Shoe Machinery Corp. v. E. H. Ferree Co., et al. (C. A. 2, 1933), 64 F. 2d 101;

Allen Filter Co. v. Star Metal Mfg. Co., et al. (C. A. 3, 1930), 40 F. 2d 252;

Smokador Mfg. Co., Inc. v. Tubular Products Co. (C. A. 2, 1929), 31 F. 2d 255;

Akme Flue, Inc. v. Aluminite Flexible Flue Cap Co. (C. A. 2, 1928), 27 F. 2d 736;

Yablick v. Protecto Safety Appliance Corporation (C. A. 3, 1927), 21 F. 2d 885;

Crawford, et al. v. Thomas E. Wilson & Co. (C. A. 2, 1924), 297 Fed. 617.

The findings of fact of the lower court were certainly fully sustained in the record. There is no question but that the filter panel of the patent in suit possesses a different mode of operation than the Detroit filter panel. There is no question but that it achieves an unexpected advantage over the Detroit paper filter admittedly being 7% to 10% more efficient. There is no question but that

air filters are sold to highly technical people who have given side-by-side tests of paper filters and filters made of wire screen without the filter panel of the patent in suit being suggested thereby. Under the foregoing authorities it is submitted the lower court correctly applied the proper test as to what constituted a patentable invention, heard the evidence and made his findings supported by not only the substantial evidence but all the evidence.

This same issue was raised before the Patent Office Examiner in the prosecution of the Farr patent in suit. There is no sound basis for Appellants' contention that the patent in suit can be held invalid on the Detroit patent.

Appellants' Defenses of Alleged Abandonment and Estoppel.

The contention of Appellants that by filing the continuation application Serial No. 327,833 for the earlier application Serial No. 285,904, Farr abandoned all forms of his air filter which were not specifically shown in the drawings of the continuation application, is totally unsound in fact and law. The patent statutes do not require that an inventor illustrate in his application all the different forms of his invention. All that the patent statutes require is that the inventor show the best form of his invention. The specific language of the applicable statute is as follows:

“* * * he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish from other inventions * * *.”

Revised Statutes, Section 4888.

There is no question but that the inventor Farr considered the form of the filter panel shown in the Farr patent in suit to be superior to any of the other forms illustrated in the early application—this is the only form appellee has ever sold. In filing a new application illustrating only this form of his invention Farr did not intend to and did not abandon any of the other forms. An invention is not abandoned even if an application for that invention is abandoned. As stated in *Corpus Juris*:

“A party may abandon a particular application for a patent without abandoning the intent to secure a patent at some time and therefore without abandoning the invention claimed therein. He may file a subsequent application and secure a patent.”

48 *Corpus Juris* 111.

A case directly in point is that of *Research and Development Corporation of Illinois v. Chase, et al.* (C. A. 7, 1937), 88 F. 2d 353, 355. In that case the Court squarely held that claims in a patent were not to be deemed limited merely because forms of the invention had been described in earlier abandoned applications but not in the continuation application on which the patent issued.

To the same effect is *Overman Cushion Tire Co. Inc. v. Goodyear Tire & Rubber Co. Inc.* (C. A. 2, 1930), 40 F. 2d 460, 462.

Clearly the mere fact that one form of the Farr filter was shown in the earlier application and was not shown specifically in the continuation application creates no aban-

donment. The proper course to determine Farr's intention in filing the continuation application is to examine the claims in that continuation application and the proceedings before the Patent Office. Since these clearly demonstrate that both Farr and the Patent Office intended that Claims 4, 5, 7 and 8 should not be limited to the flat wire screen, no abandonment as alleged by Appellants is created. Appellants are actually trying to read into Claims 4, 5, 7 and 8 a limitation not contained therein but contained in Claims 1, 2, 3 and 6 which are not in suit. As appears hereafter this procedure is clearly improper. There is no basis whatsoever for Appellants' contention of abandonment.

Appellants' contention that because Claim 6 of the original application No. 285,904 was not retained in the continuation application No. 327,833 an estoppel was created sufficient to prevent Claims 4, 5, 7 and 8 of the patent in suit from including the accused P-5 filter panel is without sound basis. It is not true as asserted in Appellants' brief that Claims 4, 5, 7 and 8 of the patent in suit are broader than the claims of application 285,904 and we have established herein at pages 50-51 that Claims 4, 5, 7 and 8 are in numerous respects narrower than Claim 6. We have shown that such Claim 6 was indefinite and improperly defined the Farr filter.

Even if, as asserted by Appellants, Claims 4, 5, 7 and 8 were broader than the said Claim 6 of application 285,904 it would be immaterial. It is well settled that the scope of a broad patent claim is not effected merely because the rejection of a narrow claim is followed by the

allowance of such broader claim. As stated in the leading case of *Smith v. Snow* (1934), 294 U. S. 1, 16, 79 L. Ed. 721, 730:

“It is of no moment that in the course of the proceedings in the Patent Office the rejection of narrow claims was followed by the allowance of the broader Claim 1. *Westinghouse Electric & Mfg. Co. v. Condit Electrical Mfg. Co.*, 194 F. 427, 430 (C. C. A. 2d).”

This rule is not at all disturbed by the case of *Schriber-Schroth Co. v. Cleveland Trust Co.* (1940), 311 U. S. 211, 85 L. Ed. 132, relied upon by Appellants. Such case only establishes that as to *validity* where a broad claim is anticipated by the prior art it may not be saved by reading into such broad claim the limitations in narrow claims which were deliberately cancelled in the Patent Office. No such question is here presented. The question here concerns the effect of the Patent Office proceedings on the issue of infringement, not on the question of validity. Moreover, Appellants, not Appellees, are attempting to read into the claims in suit limitations found in previously cancelled claims. Both *Smith v. Snow* and the *Schriber-Schroth* cases hold that this cannot be done.

Actually Claims 4, 5, 7 and 8 of the patent in suit are in many respects narrower than Claim 6 of application 285,904 and the law is well settled that it is immaterial that a broad claim is cancelled where it is followed by the allowance of a narrow claim when the narrow claim also fully covers the defendants' device. Here Appellants' device is unquestionably within the scope of all of the

limitations in Claims 4, 5, 7 and 8 but, as we have pointed out, not within the scope of Claim 6 of Application 285,904. There is, therefore, no basis whatever for any estoppel.

“That it was originally claimed in broader form, and that the claims were subsequently narrowed, lends no aid or support to appellant because it infringes the narrower claims. In such event there can be no file wrapper estoppel because appellant uses the process of the patent even though the cancelled claims broadly described the process.”

Ceramic Process Co. v. General Porcelain Enameling & Manufacturing Co. (C.A. 7, 1942), 129 F. 2d 803, 806.

The doctrine of file wrapper estoppel is merely that a patentee may not by construction or by resort to the doctrine of equivalents interpret any claim which he succeeded in having allowed so that it will be coextensive in scope with a rejected claim. (*Musher Foundation, Inc. v. Alba Trading Co., Inc.* (C. A. 2, 1945), 150 F. 2d 885, 888; *Southern Textile Machinery Co. v. United Hosiery Mills Corporation* (C. A. 6, 1929), 33 F. 2d 862, 865.) No attempt here has been made to construe Claims 4, 5, 7 and 8 so as to cover the same subject matter as Claim 6. Claims 4, 5, 7 and 8 in referring to mesh members, to passages walled by screen wire, the angle of the corrugations, and the progressive loading, are in all these respects more limited than Claim 6 of application 285,904 and all such features are clearly embodied and utilized in the Air-Maze P-5 filter panel.

The P-5 Filter Panel Infringes the Farr Patent.

We have established that the P-5 filter panel possesses every element of Claims 4, 5, 7 and 8 of the patent in suit and that the P-5 filter panel includes the same mode of operation and produces results substantially identical with the filter panel specifically disclosed in the patent in suit. Appellants' P-5 filter panel differs from the panel which is specifically described in the patent in suit only in the omission of the flat wire screen and in the adding of an additional angle in the crimp of the sheet. To read into Claims 4, 5, 7 and 8 of the patent, the flat wire screen, would be to impose a limitation on those claims which we have established from the proceedings on application No. 327,833 was not intended by either Farr or the Patent Office. Throughout the prosecution of the Farr application, Farr fully appreciated that his invention could be embodied either in filter panels using flat screens or those omitting the same and he deliberately and continuously sought claims such as Claims 4, 5, 7 and 8 here in suit which are not limited to the flat screen, as well as Claims 1, 2, 3 and 6 which are limited to the flat screens.

“When we are interpreting a series of claims, a limitation not present in one must not be implied, when the same limitation appears in later claims in the series. (Citing cases.)”

Western States Mach. Co. v. S. S. Hepworth Co.
(C.A. 2, 1945), 147 F. 2d 345, 350.

“* * * These combinations are not to be limited by writing into them an element contained in combinations not in suit. *Los Angeles Art Organ Co. v. Aeolian Co.* (C.C.A. 9), 143 F. 880, 885.”

Reinharts, Inc. v. Caterpillar Tractor Co. (C.A. 9, 1936), 85 F. 2d 628 at 633.

See, also:

Symington Company v. National Malleable Castings Co., et al. (1919), 250 U. S. 383, 63 L. ed. 1045;

Electric Machinery Manufacturing Co. v. General Electric Co. (C.A. 2, 1937), 88 F. 2d 11.

The mere omission from the P-5 filter panel of the wire screen is not material since the flat wire screens are not an element of Claims 4, 5, 7 and 8 in suit and since the P-5 filter panel includes the substance of the Farr invention. Infringement is therefore established.

“‘The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff’s patent. The question is, not whether the addition is material, or whether the omission is material, but whether what has been taken is the substance of the invention.’”

Stebler v. Riverside Heights Orange Growers’ Assn. (C. A. 9, 1913), 205 Fed. 735, 739.

Appellants’ P-5 filter panel is a substantial copy of the patent in suit with only such variations as do not change the substance of the panel, its mode of operation or its performance. It clearly constitutes an infringement.

“‘There is a substantial identity, constituting infringement, where a device is a copy of the thing described by the patentee, ‘either without variation, or with such variations as are consistent with its being in substance the same thing.’ *Burr v. Duryee*, 1 Wall, 531, 573, 17 L. ed. 650, 658.”

Sanitary Refrigerator Company v. Winters (1929), 280 U. S. 30, 41, 42, 74 L. Ed. 147, 156.

The Supreme Court of the United States in the recent case of *Graver Tank & Manufacturing Company, Inc. v. Linde Air Products Company* (1949), 339 U. S. 605, 94 L. Ed. 1097, has expressly condemned the construction of patents so as to limit the same to such literal detail of the patented device as would permit a copyist, who has made merely unimportant and insubstantial changes and substitutions which have added nothing to the device, to escape the scope of the patent. In this case the Supreme Court stated:

“But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing.”

And see:

Chicago Pneumatic Tool Co. v. Hughes Tool Co. (1938), 305 U. S. 643, 83 L. Ed. 415 (rehear. den. 305 U. S. 673, 83 L. Ed. 436).

“‘Rarely do we find an example of what might be called perfect infringement. No patent infringer would be so silly as to make and vend a device similar in every minute detail to a patent. Infringement connotes, between the patent and the accused device, merely correspondence as to the substantial, dominate and essential elements. Any other view would make of a patent a foolish and fatuous thing.’”

Bianchi v. Barili (C. A. 9, 1948), 168 F. 2d 793, 800.

To permit the Appellants, who have clearly employed every element of Claims 4, 5, 7 and 8 of the patent in

suit and made in fact a deliberate copy of the Farr filter panel, to escape the charge of infringement would be a clear violation of the rules for determination of infringement in patent cases as thus laid down not only in the recent decisions of the Supreme Court but by this Court.

**Appellants' Contention That the
Claims Are Invalid for Failure to
Comply With 35 U. S. C. A. Sec. 33.**

Appellants contend that the claims are invalid as indefinite and functional. Appellants rely on such cases as *General Electric Co. v. Wabash Appliance Corp.* (1937), 304 U. S. 364, 82 L. Ed. 1402, as holding invalid claims where the sole novelty of the invention was defined in purely functional language. The short answer to this contention is that the patent in suit covers a novel combination rather than the novelty of any particular element. (*Faulkner v. Gibbs*, 338 U. S. 267, 94 L. Ed. 62.) Appellants point to the clause of the claims referring to the multiple subdivision of the panel and assert this to be the only point of novelty, yet filter panels having multiple subdivisions in two dimensions are old in the art as set forth in Appellants' Brief, page 30. Furthermore, the language in question is not functional and indefinite. Whether or not a panel is divided horizontally and vertically is a physical feature readily apparent from an inspection of the face of any filter panel. There was no testimony at the trial that this language is indefinite and Appellants' expert conceded that it was readily un-

derstandable to an engineer [R. 360]. The multiple subdivision of the Farr filter panel results from the fact that mesh wire screens are set parallel to the direction of air flow and corrugated. The claims recite specifically the presence of mesh members set parallel to the direction of air flow and Claim 5 even specifically refers to the crimping of these sheets. The claims do not cover any air filter panel with multiple subdivisions in the horizontal and vertical directions but do cover such a panel in which the mesh members or wire screens are set parallel to the direction of flow and crimped as shown and described in the patent in suit. Appellants' infringing P-5 filter panels have employed this specific means for multiple subdividing the panels. There is no rational foundation for any contention that the claims in suit are indefinite or functional. The *General Electric Case* holds:

“A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible and even desirable, but a characteristic essential to novelty may not be distinguished from the old art solely by its tendency to remedy the problems in the art met by the patent.”

304 U. S. 364, 373, 82 L. Ed. 1402, 1407.

Clearly the claims of the patent in suit are not within the rule of this case. When the claims are considered as a whole and read in the light of the specification they are entirely clear and definite. The cases relied upon by Appellants each recognize that their doctrine is limited

only to patents where the claims cannot be made definite by referring to the specification.

“Respondent urges that the claims must be read in the light of the patent specification, and that as so read they are sufficiently definite. Assuming the propriety of this method of construction, *cf.*, *General Electric Co. v. Wabash Appliance Corp.*, *supra* (304 U. S. at 373-375, 82 L. ed. 1407, 1408, 58 S. Ct. 899), it does not have the effect claimed, for the description in the specification is itself almost entirely in terms of function.”

United Carbon Co. v. Binney & Smith Co. (1942),
317 U. S. 228, 234, 87 L. Ed. 232, 236.

The claims of the patent in suit when fairly construed in the light of the specification are clear and definite. The following cases will be found to fully support the validity of the patent in suit. Each sets forth that a patent should not be stricken down for uncertainty or indefiniteness when a fair reading of the specification and claims will protect the invention:

Minnesota Mining & Mfg. Co. v. International Plastic Corp. (C. A. 7, 1947), 159 F. 2d 554;

Paul E. Hawkinson Co. v. Wilcoxon (C. A. 6, 1945), 149 F. 2d 471;

Research Products Co. v. Tretolite Co., et al. (C. A. 9, 1939), 106 F. 2d 530;

Carnegie Steel Company v. Cambria Iron Company (1902), 185 U. S. 403, 46 L. Ed. 968;

Webster Loom Co. v. Higgins (1882), 105 U. S. 580, 26 L. Ed. 1177,

The claims in suit when considered as a whole and read in the light of the specification are directed to a filter panel made out of crimped or corrugated wire screen set parallel to the direction of flow so that the corrugations divide the panels in horizontal and vertical direction in a multiplicity of small passages. There is no basis whatever for any contention that the claims of the patent in suit are in any respect indefinite or functional.

Conclusion.

It is, therefore, respectfully submitted that the Findings of Fact fully support the judgment of the lower court. Appellants have utterly failed to establish any defenses to the merits of this case.

Respectfully submitted,

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FARR COMPANY, a corporation,

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REPLY BRIEF OF APPELLANTS.

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REPLY BRIEF OF APPELLANTS.

Introduction.

This is appellants' reply to the "Brief of Appellee," filed in this action, sometimes referred to hereinafter for convenience as "Appellee's Brief."

Appellee's Brief is significant in the following general aspects:

(a) Appellee's Brief ignores and does not attempt to answer many of the principal contentions of our Opening Brief;

(b) Appellee's Brief, by accident or otherwise, wholly misconstrues some of our principal contentions;

(c) Appellee's Brief misrepresents many of the Findings of Fact of the District Court;

(d) Appellee's Brief attempts to change the position that plaintiff took in the District Court on several important points; and

(e) Appellee's Brief consists largely of statements unsupported by the record; it should be limited to those portions where the record is correctly cited in substantiation of the statements made.

Most of the major contention of Appellee's Brief have been answered in advance by Appellants' Opening Brief. Some require further comment herein. Some of the erroneous or highly misleading statements of Appellee's Brief, which do not fit readily into the context of this reply, are set forth briefly in the Appendix at the end hereof.

Appellee's Brief contains 56 pages of a so-called "Statement of the Case," and 22 pages of "Argument." Since its "Statement of the Case" is largely argument, we make no attempt to follow the form of Appellee's Brief in this Reply. All emphasis is ours, unless otherwise noted.

The Filter of the '479 Farr Patent Has No "New Mode of Operation."

Appellee's Brief repeatedly refers to an alleged "new mode of operation" which it ascribes to the filter of the '479 patent in suit. As we shall demonstrate, there is no "new" mode of operation.

Appellee's Brief baldly asserts (p. 26): "the lower Court found that the Farr patent in suit disclosed a new combination of old elements [Finding 9, R. 61] combining old elements in a new way *so as to provide a new mode of operation* and new characteristic performance [Findings 3-6, incl., 8-14, incl.]." Examination of these findings plainly shows that the District Court found no such

thing. There was no finding by the District Court, in substance or effect, that the '479 filter has a "new" mode of operation, as we pointed out in our Opening Brief (pp. 19-20).

The "mode of operation" of the '479 patent filter is defined by Finding of Fact 4 [R. 59] as follows:

"4. At the start of the operation of the air panels of the patent in suit portions of the air flow through the mesh of the screening members into the adjoining passages but as the panels become loaded with dust the flow of air becomes more and more confined to flow through the passages."

Such "mode of operation" is set forth in claim 4 of the '479 patent in suit as follows:

". . . whereby the medium may flow through the mesh of said members near the entrance of the panel when the filter is clean and partially through said passages and thence through the mesh of the members located progressively towards the exit of the panel as the panel becomes progressively loaded with particles."

It is set forth in claims 7 and 8 of the '479 patent in suit as follows:

". . . as the mesh of the members becomes progressively clogged the medium to be filtered may flow through such passages and encounter unclogged openings in said mesh members."

Plaintiff's "prior art chart," Exhibit 32 [R. 986, 986-A], specifically admits that such "mode of operation" is present in the air filters of the prior art patents to Henshall, Orem, and Merryweather.

Thus, the District Court did not make any finding that the mode of operation of the '479 filter defined by its Finding 4 was in fact new, and plaintiff-appellee has flatly admitted in the evidence that such mode of operation was *in fact old in the art*.

Obviously, the filter of the '479 patent in suit has no "new" mode of operation, and we suggest, the statements in Appellee's Brief to the contrary may be dismissed as mere sophistry.

The Filter of the '479 Patent Provides No New or Different or Unusual or Surprising Results.

Appellee's Brief (pp. 58-59) states:

"The Farr filter panel achieved a new and *unusual and surprising result* of combining the ability to provide high efficiency in removing dust from air with a lower pressure drop than previous commercially built filters, which pressure drop does not rise as rapidly as previous filters. This was Finding 4 of the lower Court . . ." [Apparently, "4" is a typographical error in Appellee's Brief and should have been "6," as Finding 4 is wholly irrelevant.]

Examination of Findings 4 and 6 [R. 59-60], however, plainly shows that the District Court found no such thing. Nowhere did the District Court find, or otherwise indicate that it thought, that the results provided by the Farr '479 filter are either "unusual" or "surprising."

We concede, of course, that the efficiency and pressure-drop characteristics of the Farr '479 filter are "new" in the sense that they are slightly different from those of prior filters, but it is our contention that any such

differences are at best merely in minor degree and not in kind, and, certainly, do not sustain patentable novelty, as we pointed out at length in our Opening Brief (pp. 36-37), where we showed that the prior art Detroit Air Filters, and the Air-Maze Type B filters, had performance characteristics substantially the same as those claimed by plaintiff for its '479 filter in suit.

As shown by plaintiff's evidence, Exhibit 29 [R. 981], the *average* filtering efficiency of the paper Detroit Air Filter ("Brand Y") was 78.25%, as against an *average* filtering efficiency of the Farr '479 filter of 80.4% (computing "average efficiency" by taking the sums of the efficiency readings at four-hour intervals and dividing such sum by the number of readings). *Average* efficiency, of course, is the pertinent figure, as it provides an index of the over-all ability of a filter to remove dust from the air. Similarly, plaintiff's evidence, Exhibit 27, shows a number of competitive prior art filters having *even higher* average efficiencies [Fig. 6 filter, 82%; Fig. 33 filter, 81.2%; Fig. 58 filter, 81.8%; Fig. 66 filter, 84.3%].

It is therefore plain that as to *filtering efficiency*, there is nothing "unusual" or "surprising" about the performance of the '479 filter.

As to the rate of pressure drop rise, Appellee's Brief (p. 59) concedes that the Detroit Air Filter gave a slowly rising pressure drop.

When it is remembered that the standards of the industry permitted a pressure drop rise of up to 0.5 inches, and that all of the prior art filters referred to in the evidence had pressure drop rises well within this limit, it is plain that the results attained by the Farr '479 filter

were neither “unusual” nor “surprising.” Appellee’s Brief, of course, fails to point out any logical reason why the alleged results of the ’479 filter should be considered either “unusual” or “surprising.”

We suggest that any novelty, or even any alleged superiority, of the Farr ’479 filter over the prior art is at best minute, and does not warrant any inference of patentable invention.

The ’479 Claims in Suit Cover Mere Unpatentable Aggregations of Elements.

In our Opening Brief (pp. 28-34) we showed at length where every element of the ’479 claims in suit are to be found in the prior art of record, and that each of such elements functions exactly the same in the ’479 filter as it did separately in the art. No attempt is made in Appellee’s Brief to refute this statement of fact, and, indeed, Appellee’s Brief does not even deny the fact.

If all of the elements of the ’479 claims in suit are separately old in the prior art, where they separately performed the same functions as they perform in the ’479 device (as is clear from the evidence, and as seems to be conceded by Appellee’s Brief), the results of the ’479 filter are no more than the sum total of the individual functions of its elements. This is mere unpatentable aggregation, and is not invention. See:

Reckendorfer v. Faber, 92 U. S. 347;

Richards v. Chase Elevator Co., 39 U. S. 991;

Grinnell Washing Mach. Co. v. Johnson Co., 247 U. S. 426.

The Filter of the '479 Patent Did Not Fill Any Long-sought Demand in the Art.

Appellee's Brief would have it appear that the filter of the '479 patent provides results that were long sought in the art. There is no evidence to support such a contention, and, in fact, the evidence is to the contrary.

In support of its assertion, Appellee's Brief points (pp. 16-17) to Exhibit 27, the American Association of Railways Report. As we showed in our Opening Brief (p. 42), this report was merely on the relative characteristics of various filters on the market in 1937.

This report, PX-27, was clearly hearsay, as its author or authors are unknown and were never called as witnesses. True, Professor Rowley provided some of the information upon which the report ostensibly was based, but the report stated (p. 4) that its information was obtained additionally from "road tests conducted on the Illinois Central Diesel electric train" and "a questionnaire." Obviously, such report was merely hearsay as to the defendants, and its admission into evidence was clear error. Since the District Court placed great reliance on this report, as is admitted by Appellee's Brief (pp. 16-17), obviously its erroneous admission into evidence was highly adverse and prejudicial to defendants.

PX-27 shows (p. 9) that the maximum permissible pressure drop at that time (the year 1937) was 0.4 inches of water, yet all the evidence in this action is to the effect that the *present* maximum permissible pressure drop, as set by industry standards, is 0.5 inches of water (see our Op. Br. pp. 9, 37). Obviously, the advent and long commercial use of the Farr '479 filter with its alleged low pressure drop has not reduced the maximum pres-

sure drop permitted by industry standards; in fact, the maximum permitted by the standards has risen! This is exactly contrary to the normal expectation, if in fact the Farr filter was the answer to any prayer of the filter-using industry.

Plaintiff's Exhibit 27 nowhere indicates that the railroads or anyone else was not fully satisfied with the air filters available on the market in 1937. There is no direct evidence of any need or demand for a filter having the specific characteristics of the Farr '479 device. It seems to us logical to assume that if in fact there was such a need or demand, disinterested user-witnesses would have been plentiful to establish it, yet none were called to testify. The mere fact that Appellee may have sold a substantial number of the '479 filters does not, in itself, prove such a demand.

The '479 Filter Lacks Invention Over the Prior Art.

In our Opening Brief we stressed the point that even if the '479 filter differs in one particular or another from each of the various prior art filters in evidence, still the particular of difference in each case was at best minor in character and the '479 patent lacks invention. Thus, we said that: the only difference between '479 and the paper Detroit Air Filter is that the '479 patent uses wire screen instead of paper (Op. Br. pp. 39-42); the only difference between '479 and the prior use Farr '480 air cleaner and cooler was that '479 added a bend in the corrugations (Op. Br. pp. 43-46); the only possible structural difference between '479 and the prior art St. Cyr patent was that in '479 the change of direction of the corrugations is *more* abrupt (Op. Br. pp. 47-51); and the only possible difference between '479 and the Niestle

(French) patent was that the latter fills the wire mesh with oil instead of leaving it open as in '479 (Op. Br. pp. 51-54). As to each, we asserted that such features of possible difference were all extensively shown in the other prior art, and that *no invention was required to modify any of such prior art to provide exactly the structure of the '479 patent in suit.*

Appellee's Brief does not attempt to answer our foregoing contentions, but merely argues that no single prior art patent nor the '480 prior use device includes all of the elements of the '479 claims here in suit. This, we suggest, simply avoids the issue, as our above argument is addressed to the matter of *invention*, not *novelty*.

We submit that the '479 patent in suit is plainly invalid for lack of invention for any one of such reasons asserted by us.

The District Court Misconstrued Pertinent Prior Art.

The District Court [F. 10, R. 61] found that the prior art patents to Wood, Kirkham, Row, and Moller "are not filter panels operating on the principle of impingement of particles on collecting surfaces and do not remove dust by the same mode of operation referred to in Finding 4." In our Opening Brief (pp. 28-29, 45) we pointed out that *so far as dust removal is concerned* these prior art patents all show filters which operate to remove dust on the impingement principle, and that the District Court's finding to the contrary was erroneous. Appellee's Brief does not, and cannot, deny that *so far as dust removal is concerned*, all of such patents show filters which operate on the "impingement principle."

The District Court obviously, and erroneously, dismissed these prior art patents as lacking in pertinency on the theory that whereas in the patent in suit the dust hits and sticks to the collecting surfaces and remains there for days until the filter is cleaned, in such prior art, while the dust “might impinge for a moment” it is almost immediately washed off [R. 819]. Appellee’s Brief (p. 27) also attempts to distinguish on this ground.

This, of course, is immaterial so far as the removal of dust from the air is concerned, as the ’479 patent says nothing with regard to how the filter is ultimately cleaned of dust.

Actually, however, appellee recommends to industry that its ’479 filter be *washed with water* to clean dust therefrom, its sales literature, PX-7, stating on page 6:

“An ordinary garden hose and nozzle and water pressure of 30 p. s. i. will, in most cases, satisfactorily clean the filter.”

Thus, in both the ’479 filter and the “water-washed” filters of the prior art, the dust is actually cleaned from the filter by washing with water. The mere fact that in such prior art the water-washing is at more frequent intervals than the recommended interval for washing the ’479 filter does not, we suggest, in any way show a different mode of operation so far as *either* cleaning or dust removal is concerned.

We therefore submit that such prior art patents are directly pertinent and all operate to remove dust from air by the impingement principle, and that the District Court erroneously dismissed such art from consideration.

The '479 Patent in Suit Is Invalid for Lack of Invention Over the '480 Prior Use Device.

Appellee's Brief (p. 38) states: "*The Farr '480 Patent*: Appellants contend that the patent in suit is invalid over the Farr patent on the humidifier." This statement is deliberately erroneous, as appellants have never so contended. What we do contend is that the Farr '479 patent in suit is invalid for lack of invention over the *prior use '480 device*, first commercially sold in 1937 and differing from the '479 patent as to the filter media only in the absence of the bends in the corrugations (Op. Br. pp. 43-46).

Appellee's Brief (p. 38) further states:

"Appellants are in the impossible position of having to contend on the one hand that such sales of the humidifiers do not establish a date of invention by Farr of the filter panel in suit (for the purpose of confining the date of invention of the patent in suit to July 22, 1939) and on the other hand argue that the invention of the Farr filter panel was embodied in such humidifiers . . ."

This statement also deliberately misconstrues our argument. We say, not that the '480 "humidifier" embodies the invention of the Farr '479 filter, but that the '479 patent does not constitute an invention over the '480 device. Obviously, the '480 prior use device did not embody the same invention as covered by the claims here in suit, as it did not have any "bend" or "change of direction" in its corrugations, which is an element of each of the claims here in suit. Appellee's Brief (p. 39) concedes this. What we do say is that no invention was involved in the '479 patent in merely putting "bends"

in the corrugations of the prior use '480 device (Op. Br. pp. 43-46).

The testimony of R. S. Farr, president of appellee, plainly establishes that the '480 device was on sale and in commercial use long prior to the time when the '479 filter was thought of [R. 1089-1140]. The other son, M. S. Farr, admitted that *after* they had some experience with the evaporative cooler "we got the idea of building an air filter based on somewhat the same principle as the cooler" [R. 293]. Appellee's Brief (p. 39) distinguishes the structure of the '480 prior use device from that of the '479 filter. Thus, there can be no question of the fact that such '480 prior use device was prior art as against the later filter of the '479 patent in suit.

The applicant, M. N. Farr, likewise at all times treated the filter of the '479 patent in suit and the '480 prior use humidifier as two different and separate devices, as he filed two separate patent applications thereon, each of which resulted in a patent. Similarly, his son M. S. Farr distinguished the two devices, although he conceded that they were constructed generally the same [R. 349-353].

It is to be noted particularly that the District Court made no specific finding of fact as to the Farr '480 prior use device (and appellee never suggested one). The trial court, however, obviously felt that because the '480 prior use device was a "water-washed" device it was lacking in pertinency. We have pointed out the error in this in the preceding section of his reply with regard to the prior art patents to Wood, Kirkham, Row, and Moller, and the

same observations apply equally well to the '480 prior use device. As pointed out in effect by Mr. Duncan, plaintiffs' expert, in the '480 device the water on the screens acts as an *adhesive* to catch and hold the dust [R. 759], and he further pointed out the interchangeability of water and oil on filter screens with regard to the prior art Row patent [R. 784-785]. So far as removal of dust from the air is concerned, the '480 prior use device operates in the same way as the '479 patent in suit. In any event there would be no invention in using oil instead of water as the adhesive in the prior use '480 device, as is shown by Duncan's testimony as follows:

“Q. Well, using the filter media as shown in the '480 patent, if you wanted to use that simply as an air filter, it would be an obvious expedient to dip that panel in oil? . . .

The Witness: That would be a logical thing to do. Take the screen media of the '480 patent, and if you want to use it for a filter, it will eliminate a lot of difficulties if you just dunk it in oil and let it drain and then put it in place to act as a filter. The passages are pretty big and you can see straight through them, but it would catch dust.”

Defendants' P-5 Filter Does Not Infringe.

Appellee's Brief (p. 10) erroneously attempts to reduce all of appellants' contentions as to non-infringement to a single contention that by omitting the flat screens of the '479 patent defendants' P-5 filter avoids infringement. Appellee's Brief then at length attempts to answer such single contention. We think that the omission of flat

screen in the defendants' accused P-5 filter does in fact avoid infringement, for the reasons set forth at length in our Opening Brief. We do not propose to reargue this point here.

Appellee's Brief, however, substantially ignores the *other* equally sound reasons why the accused P-5 filter does not infringe which were detailed in our Opening Brief.

Our Opening Brief (pp. 57-59) pointed out that abandoned claim 6 of the abandoned Farr '904 application was specifically directed to a filter in which the corrugations of adjacent screens extend "in *diagonally opposite directions* whereby the crests of each convolution [corrugation] in a single strip are *brought into contact* with the crests of each convolution [corrugation] of the *next adjacent* strip"; that this is the specific structure of the defendants' accused P-5 filter; that it is not shown or described in the '479 patent in suit; and that, since such claim 6 was abandoned by Farr in response to a rejection thereof as unpatentable by the Patent Office, by file-wrapper estoppel appellee is now estopped from attempting to construe the claims here in suit to cover such specific features so abandoned.

Appellee's Brief (p. 51) concedes that such abandoned claim 6 is in some respects *narrower* than any of the '479 claims here in suit. It is obviously narrower in the respects italicized above. The decision of this Court in *Gasair Corp. v. Ransome Co.*, 140 F. 2d 818,

quoted at page 62 of our Opening Brief, is thus directly in point, since in that case the Court said: "*That this rejected claim is in a sense narrower than those allowed does not impair its use as a means of discovering the limits of the claimed invention.*" We again suggest that the appellee should not be permitted to recapture by interpretation of the claims here in suit the specific elements earlier claimed in claim 6 and abandoned by the applicant Farr. Such elements, of course, are specific features distinguishing the defendants' accused P-5 filter from that shown and described in the '479 patent in suit.

Secondly, as we pointed out in our Opening Brief, the patent here in suit is specifically limited to the inclusion of passages extending through the filter panel which subdivide the panel throughout its depth in two dimensions (see claims 7 and 8), and defendants' accused P-5 filter has no such passages since the space between any two adjacent crimped screens is open laterally entirely across the filter except where the crests of the corrugations cross and touch. Appellee's Brief (p. 12) attempts to construe such "passages" in the '479 claims in suit as formed *solely* by the corrugations of the crimped screens. This is erroneous, however, in view of the plain teaching of the '479 patent to the effect that in it the *flat screens* form one wall of such passages [R. 840: p. 1, Col. 2, lines 21-24, and p. 2, Col. 1, lines 6-10]. We therefore submit that merely because the accused P-5 has corrugations in its screens does not mean that such corrugations form "passages" extending through the panel and subdividing

the panel in two dimensions, as claimed in the '479 patent. We submit that the accused P-5 filter plainly does not have "passages" as shown and claimed in the '479 patent in suit, and does not infringe.

Conclusion.

We submit that Appellee's Brief does not answer the principal contentions made by appellants on this appeal, and that the decision of the District Court should be reversed for the reasons stated in our Opening Brief.

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APPENDIX.

Erroneous and Misleading Statements in Appellee's Brief.

Page 5.—“First, that the Farr patent in suit for the first time provided the art with a filter panel which combined the ability to provide high efficiency in removing dust from air with a low pressure drop which does not increase rapidly [Findings 5, 6, 8, 9, 10, 11, 12, 13 and 14].”

This is represented by Appellee's Brief as the Finding of Fact of the District Court. A reference to the actual Findings, and particularly Finding 6 [R. 60] plainly shows that the District Court found no such thing. There was no finding that the '479 filter was the “first” to combine high efficiency with low pressure drop; all that Finding 6 says, in effect, is that the '479 patent combined high efficiency with a “lower” pressure drop than previously.

Page 5.—“Third, that the Farr filter panel discloses a new combination . . . which is not disclosed in *any* prior art patents [Findings 10, 11, 12, 13, and 14].”

Again, this is represented by Appellee's Brief as the Finding of Fact of the District Court. Actually, the District Court found no such thing. None of such Findings referred to, in substance or effect, find that the *combination* is not disclosed.

Page 8.—“In the instant case the trial court *has specifically found* the new and surprising result called for by this test in its expressed findings that the filter panels of the patent in suit were *the first* to combine the high efficiency in removing dust from the air with a low pressure drop which does not rise rapidly”

Here is another representation in Appellee's Brief as to the findings of the District Court, which is contrary to fact. As pointed out in the body of this reply, the trial court nowhere "specifically found the new and surprising result," and, as pointed out above, did not find that the '479 filter was the "first."

Page 10.—"The lower court found that Appellants' P-5 filter panel was basically identical with the patent in suit; *that they were of substantially identical construction, mode of operation and performance.*"

Again, the District Court did not so find. Findings 19 and 20 [R. 64] fall far short of the loose and free translation given them by Appellant's Brief.

Page 12.—". . . the 'air passages' of the filter panel of the patent in suit are formed and defined solely by the crimped or corrugated wire screen 4. . . ."

This entirely misconstrues the plain teaching of the '479 patent to the effect that its flat screens co-operate with the crimped screens to form the passages, as follows:

"certain of the screen wire members 4 of the filter are crimped or corrugated, as indicated in Fig. 3, to provide *in cooperation with adjacent screen members* air passages 5." [Pg. 1, Col. 2, lines 21-24.] The flat screen 9 "serves both *to define more restricted passages for the flow of air* and also to better retain the filter members 4 in their desired positions" [P. 2, Col. 1, lines 6-10].

Page 12.—". . . these flat screening members merely provide slight additional dust collecting surfaces, facilitate the process of manufacture and stiffen the filter. [R. 111.]"

This is erroneous for the reasons last given.

Pages 13-14.—“. . . the air filter panel of the patent in suit is dependent for its filtering action on the air actually passing through the openings of the screen . . .”

This is erroneous. The '479 patent clearly teaches that it is unnecessary for the air to pass through the screens, as follows:

“I have further discovered that it is unnecessary in an air filter panel to force the flow of air through the screens employed in the panel to secure the desired cleaning efficiency” [P. 1, Col. 1, lines 28-31].

Page 19.—“Appellants’ suggestion (App. Br. p. 10) that these tests are ‘fantastic’ as to the 90% efficiency of the Farr filter finds no support whatever in the record . . .”

Our statement was correct. Plaintiff’s Exhibit 8, its recent Technical Report published to the industry, plainly states (p. 4): “The first test with this standardized dust showed the Farr Air Filter to have an efficiency of 92%. This high efficiency was misleading;” and, again (p. 6), as to more recent tests of the Farr '479 filter “. . . it was disconcerting to find that the efficiency of the Farr Air Filter dropped considerably below the published claim of 92%.”

Page 26.—“The lower court found that the Farr patent in suit disclosed a new combination of old elements [Finding 9, R. 61] combining old elements in a new way *so as to provide a new mode of operation and new characteristic performance* [Findings 3-6, incl., 8-14, incl.]”

As to the italicized portion, the District Court found no such thing, as an examination of the referenced Findings plainly shows.

—4—

Page 28.—“As shown on Plaintiff’s Claim Chart [Ex. 32] for example considering Claim 4 [R. 986] this patent is therefore not an impingement filter operating to collect particles on a collective surface—the water collects and washes away the dust”

This is misleading in the extreme. Actually, Mr. Duncan, plaintiff’s expert clearly testified that the prior art Row patent was an “impingement type” filter, as follows:

“Q. Then you went on to say: ‘The disclosure of the fundamental principles of operation of an impingement type filter are very clearly set forth in Mr. Row’s patent.’ Do you agree that that is the situation? A. I have no quarrel with that statement.” [R. 782.]

“Q. But so far as the removal of the dust from the air is concerned, the Row construction is an impingement type filter, is it not? A. Particles impinge on the surface of the Row structure; yes.

“Q. And are collected there until they are washed away by the water? A. Yes.” [R. 783.]

Pages 42-43.—“ . . . The lower court in its Memorandum Opinion clearly correctly finds that it [St. Cyr] was not an air filter panel; that it was a device supplied by fluid rather than an impingement filter;”

Reference to the District Court’s Opinion [R. 820] plainly shows that it never found or intimated that the St. Cyr patent “was not an air filter panel” or was not an “impingement filter,” as represented by Appellee’s brief.

Pages 50-51.—“ . . . It does not define (as all of the claims in suit define) that the members, whether strips

or wire screen, are positioned in the panel 'extending in the general direction of the intended flow through the panel of medium to be filtered,' whereas the record here demonstrates that this feature is essential to the Farr panel. . . ."

This is plainly erroneous, as claims 7 and 8 in suit say nothing about screens "extending in the general direction of the intended flow." Also, if such feature is "essential to the Farr panel," as represented by Appellee's Brief, claims 7 and 8 are plainly invalid as failing to include an essential element. See: *Goodman v. Super Mold Corp.*, 103 F. 2d 474, 480 (C. C. A. 9th, 1939); *Crampton Mfg. Co. v. Crampton*, 153 F. 2d 543, 544 (C. C. A. 6th, 1946); *Altoona Publix Theatres, Inc. v. American Tri-Ergan Corp.*, 294 U. S. 477, 55 S. Ct. 455, 79 L. Ed. 1005, at 1012; *Great A. & P. Tea Co. v. Supermarket Equip. Corp.*, 340 U. S. 147, 71 S. Ct. 127, 95 L. Ed. 162 at 165.

Page 59.—"Not only does the combination of the Farr patent in suit exhibit new functions and new and unusual and surprising results but there is an expressed finding that this combination and the new results were not obvious from the prior art."

The District Court nowhere so found, in substance or effect.

Page 62.—"Appellants make no attempt to establish that there exists any prior art having the combined characteristics of high efficiency and low pressure drop with the slow rise in pressure drop. Notwithstanding the findings of the lower court that this constituted a new result. . . ."

The District Court nowhere found that combining “characteristics of high efficiency and low pressure drop with a drop with a slow rise in pressure drop,” either in substance or effect, was “a new result.”

Page 69.—“. . . It is not true as asserted in Appellants’ brief that Claims 4, 5, 7 and 8 of the patent in suit are broader than the claims of application 285,904”

This is directly contrary to the position taken by appellee in the District Court, in which it represented twice to the District Court that claim 6 of abandoned application 285,904 was *narrower* than the ’479 claims here in suit [R. 815-817].

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES D. GRATIOT and AIR-MAZE CORPORATION,
Appellants,

vs.

FARR COMPANY, a corporation,
Appellee.

SUPPLEMENTAL BRIEF OF APPELLANTS.

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Appeal No. 13,352

IN THE

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Appellants,

vs.

FARR COMPANY, a corporation,
Appellee.

SUPPLEMENTAL BRIEF OF APPELLANTS.

I.

Supplementary Statement of the Case.

1. Introduction.

By an order dated May 27, 1953 [R. 1186], this Court remanded this case to the District Court for the taking of further evidence with regard to an air filter known as the "Kleenaire" filter, which, it is asserted by the defendants, was in public use and on sale long prior to the invention of the Farr patent (No. 2,286,479) in suit and anticipates and invalidates the patent in suit. Such evidence was heard by the District Court and on November 19, 1954, the District Court entered its judgment [R. 1182] that the new evidence required no modification of its earlier judgment [R. 67], holding the patent in suit

valid and infringed by appellants. By its second notice of appeal [R. 1183] appellants appealed from this second judgment of the District Court sustaining the patent in suit. The District Court confined the rehearing to evidence with respect to the "Kleenaire" filter [R. 1187].

This brief is supplemental to the briefs already on file herein and does not repeat the arguments set forth therein. There are two forms of "Kleenaire" filters presented by the new evidence in this case: (a) one form in which the crimps or corrugations of the wire screen were at an angle of about 9° to the face of the filter; and (b) another form in which the crimps were at an angle of about 45° to the face of the filter.

2. The " 9° Kleenaire" Filter.

The District Court found that prior to the date of invention of the Farr patent (No. 2,286,479) in suit, "Kleenaire" filters as disclosed in the bulletin, Defendants' Exhibit HHH, were made and sold, and that the sample filters, Defendants' Exhibits SSS and TTT, are specimens thereof [Finding 24, R. 1178]. Plaintiff, in addition, expressly admitted that copies of such bulletin, Exhibit HHH, were printed and distributed to the public in 1931 and/or 1932, and that such "Kleenaire" filters were in public use in the United States prior to July 1, 1937 [plaintiff's answers 1-4 to Request for Admissions, R. 1171-1172]. Such filters are hereinafter referred to as the " 9° Kleenaire."

Consequently, there is no issue on this appeal as to the fact of the public use and sale of such " 9° Kleenaire" filters long prior to the alleged invention of the patent in suit or as to their construction. The primary question

with regard thereto is: Did the prior use and sale of the "9° Kleenaire" filter invalidate the Farr '479 patent in suit? There are the subsidiary questions, of course, as to whether the "9° Kleenaire" filter had substantially the same construction and operated in substantially the manner to produce results comparable to the results of the alleged invention claimed in Farr '479 patent in suit.

The "9° Kleenaire" was made and sold in substantially the same sizes as certain of the Farr filters made and sold by plaintiff under the '479 patent in suit. The "9° Kleenaire" was made in Types "A" and "B," Type "A" being 20" x 20" x 4" and Type "B" being 20" x 20" x 2½" [R. 1222-1226, 1232, 1236]. The plaintiff's Farr filter is likewise made in about the same sizes [Ex. 7].

The "9° Kleenaire" filter was formed of a plurality of rectangular strips or sheets of metal fly screen of 14 or 16 mesh [R. 1340, 1379-1382]. The plaintiff's Farr filter is likewise made of 14 mesh screen [R. 173, 1340].

In the "9° Kleenaire" filter the strips of fly screen were crimped to form corrugations extending at an angle of about 9° with respect to the long edges of the strips [R. 1346]. The strips were packed together, one on top of the other, in a metal frame, with alternative strips placed so that the angles of the corrugations were reversed in direction [R. 1341]. Thus, adjacent strips were in contact only where the corrugations crossed [R. 1341]. In the defendants' accused P-5 filter, its corrugated strips of fly screen are likewise packed together in a frame with alternate strips having the corrugations reversed in direction, so that adjacent strips are in contact only where the corrugations cross [R. 1342]. Such reversal of direction of the corrugations of adjacent strips in the "9° Kleen-

aire" prevents the strips from nesting together [R. 1341]. The reversal of direction of the corrugations of the defendants' accused P-5 filter likewise prevents the strips from nesting together.

In the "9° Kleenaire" the corrugated screen strips, touching only where the oppositely directed corrugations cross each other, provide open zig-zag passages or channels through the filter which go over and under the points of contact of the corrugations [R. 1405-1406]. Such zig-zag passages are clearly shown in Exhibit HHH [R. 1462] by the zig-zag line labeled "air flow" in the right-hand illustration [R. 1348], and are fully described in the exhibit [R. 1461]. The existence of such open zig-zag passages in the "9° Kleenaire" was also clearly admitted by plaintiff's expert Duncan [R. 1405] and described by defendants' expert Russell [R. 1342-1344].

The purpose of the open zig-zag air passages or channels in the "9° Kleenaire" was to provide open paths for the free passage of air through the filter even when loaded with dust, to prevent an undue increase of resistance to air flow as the filter becomes loaded with dust. This is described in Exhibit HHH [R. 1461] as follows:

" . . . Due to the free passage of air allowed by the channels, a heavy dust load causes only a negligible increase in resistance. This is due to the fact that the dust load is carried on the walls of the air passages, instead of matting over the face of the filter . . .

"It will be noted from the resistance pressure curves of the graph that KLEENAIRE FILTERS have a very low resistance to the air stream. This is due to the special channels in the filter medium."

The Farr '479 patent in suit likewise teaches the desirability of providing open air passages through its filter to maintain a relatively low increase in pressure drop with an increase in the dust load in the filter [R. 840, col. 1, lines 32 to 53].

3. The "45° Kleenaire" Filter.

Another form of "Kleenaire" filter is shown in the publication, Defendants' Exhibit CCC [R. 1458, 1459], which publication plaintiff has admitted was published in the United States in the year 1931 (by plaintiff's failure to respond to defendants' Request for Admission [R. 1163]). This filter was similar to the "9° Kleenaire" except that the corrugations of the wire screen strips were at an angle of about 45° to the long edges of the strips. This filter is referred to hereinafter as the "45° Kleenaire" to distinguish it from the "9° Kleenaire."

Although there was evidence to the effect that the "45° Kleenaire" was actually made and sold in the same sizes as the "9° Kleenaire" prior to the latter [R. 1206, 1209-1210, 1230, 1233, 1249-1250], the District Court found [Finding 33, R. 1180] that the evidence was insufficient to establish that any such "45° Kleenaire" filters were ever actually made and sold. It is, therefore, an issue here as to whether such "45° Kleenaire" filters were actually made and sold prior to the invention of the Farr '479 patent in suit so as to invalidate the patent in suit. There is no question, however, that such "45° Kleenaire" was shown and offered for sale in the publication published in 1931, long prior to the invention of the patent in suit.

II.

Specification of Errors in New Findings of Fact of the District Court

1. Finding 26 [R. 1178] is erroneous in finding that the Kleenaire filters had no utility, because many of such filters were made, sold, and satisfactorily used commercially and the Court erred in failing to so find.

2. Finding 27 [R. 1178] is erroneous in finding that the terms "passages," "passages changing direction," "passages being disposed angularly," and "passages changing abruptly in direction" employed in claim 4, 5, 7, and 8 of the Farr patent in suit have only the limited meanings set forth in said Finding, because such terms are broad enough to embrace the zig-zag air passages of the Kleenaire filters and the Court erred in failing to so find.

3. Finding 28 [R. 1179] is erroneous in finding that the Kleenaire filters do not have the air passages called for by claims 4, 5, 7 and 8 of the Farr patent in suit, because such Kleenaire filters have open zig-zag air passages substantially the same as the passages of such claims and the Court erred in failing to so find.

4. Finding 29 [R. 1179] is erroneous in finding that the Kleenaire filters do not disclose the combination of elements of claims 4, 5, 7 and 8 of the Farr patent in suit referred to in Finding 9 or otherwise, because such Kleenaire filters in fact embodied the exact combinations of said claims.

5. Finding 29 [R. 1179] is erroneous in finding that if the Kleenaire filter had been subsequent to the Farr patent in suit it would not infringe the patent in suit, because unsupported by and contrary to the evidence.

6. Finding 29 [R. 1179] is erroneous in finding (if it does so find) that the claims of the Farr patent in suit set forth any new combination of elements, because all of the elements of such claims were embodied in such Kleenaire filters.

7. Finding 30 [R. 1179] is erroneous in finding that the Kleenaire filters do not have the mode of operation referred to in Finding 4, because unsupported by and contrary to the evidence.

8. Finding 30 [R. 1179] is erroneous in finding (if it does so find) that Finding 4 sets forth any new mode of operation, because contrary to the evidence.

9. Finding 30 [R. 1179] is erroneous in finding that the dust load accumulates on the face of the Kleenaire filter, because unsupported by and contrary to the evidence.

10. Finding 31 [R. 1180] is erroneous in finding that the Kleenaire filters did not achieve the results described in Finding 6, because contrary to the evidence.

11. Finding 31 [R. 1180] is erroneous in finding (if it does so find) that the results described in Finding 6 were either new or surprising, because unsupported by and contrary to the evidence.

12. Finding 32 [R. 1180] is erroneous in finding that the evidence as to the Kleenaire filter was only cumulative, because no prior art filter of the Kleenaire type was previously in evidence herein.

13. Finding 32 [R. 1180] is erroneous in finding (if it does so find) that the Kleenaire filters did not contain either the elements, the mode of operation, or the results of the filter of the Farr patent in suit, because contrary to the evidence.

14. Finding 32 [R. 1180] is erroneous in finding (if it does so find) that the results of such Farr filter were either new or surprising, because the same were old in the art.

15. Finding 32 [R. 1180] is erroneous in finding that the filter of the Farr patent in suit was not obvious to one skilled in the art either from such Kleenaire filters alone or in connection with the other prior art of record such as the Detroit paper filters, because unsupported by and contrary to the evidence.

16. Finding 33 [R. 1180] is erroneous in finding that there is no preponderance of evidence, or that the evidence was insufficient to support a finding that any Kleenaire filters were ever made and sold which differed from those described in the bulletin, Defendants' Exhibit HHH, or the specimens, Defendants' Exhibits SSS and TTT, or which had filter media with corrugations at a 45° angle or any other angle such that the corrugations did not terminate at one end or other in the filter frame, because the evidence was insufficient to support such a finding and there was no contrary evidence, and the Court erred in failing to find that Kleenaire filters having such corrugations at approximately a 45° angle were in public use and on sale in the United States long prior to the invention of the Farr patent in suit.

17. Finding 34 [R. 1181] is erroneous in finding that the evidence presented with respect to the Kleenaire filter in no way "effects" (*sic*) or requires any modification of previous Findings 8 and 15.

III.

The Argument.

1. The Kleenaire Filters Embodied All of the Alleged Essential Elements of the Farr '479 Patent in Suit.

In the Court below plaintiff's counsel enumerated the alleged *essential* elements of the Farr '479 patent in suit as follows:

“Mr. Leonard S. Lyon: May the Court please, at the outset of this case I stated that the filter of the panel of the patent in suit had a novel construction and that the essential elements of that construction consisted, first, of a plurality of sheets of crimped wire screen arranged parallel to the direction of air-flow and forming passages through the filter.

Second, that the sheets divided the panel in two dimensions into a plurality of subdivisions.

Also, third, that a portion of each of the passages was disposed angularly so as to provide a change of direction of the flow of the air through the passages.

I stated that those were the essential characteristics of this patented filter. Mr. Duncan's testimony was to the same effect. * * *” [R. 813].

The Brief for Appellee (p. 13) likewise admits that the foregoing three elements are the essential elements of the patent in suit.

Each of said three so-called essential elements of the Farr patent in suit are plainly embodied in the Kleenaire filters, as shown by the testimony of Mr. Duncan, plaintiff's expert witness, and confirmed by Mr. Russell, defendants' expert.

The Kleenaire filters each included “a plurality of sheets of crimped wire screen arranged parallel to the direction

of air flow," such screens forming "passages through the filter," the screen sheets subdividing the panel in two dimensions into a plurality of subdivisions [R. 1339, 1342-1346, 1427], and the passages changing "direction" [R. 1349, 1428]. As pointed out by Mr. Duncan [R. 1428], the changes in direction of the zig-zag passages of the Kleenaire filter are illustrated by the colored strings in physical Exhibit VVV.

Thus, the Kleenaire filters embodied all of the elements that plaintiff has identified as being *essential* in the filter of the Farr '479 patent in suit.

2. The Kleenaire Filters Embodied All of the Elements of the Claims of the Farr '479 Patent in Suit.

In a patent case we are primarily concerned with the claims of the patent in suit, because the claims define the alleged invention. See: *Milcor Steel Co. v. George A. Fuller Co.*, 316 U. S. 143, 145, 86 L. Ed. 1332, 1334, 62 S. Ct. 969 (1942); *Gasair Corporation v. Ransome Co.*, 140 F. 2d 818, 819 (C. C. A. 9th, 1944).

We submit that every element of claims 4, 5, 7 and 8 of the Farr '479 patent in suit was embodied in both of the Kleenaire filters and particularly in the "9° Kleenaire." Illustrative of this, claim 5 of the patent in suit, as shown by the undisputed evidence, may readily be applied to the "9° Kleenaire" filter as follows:

Claim 5 covers "a filter panel operating on the principle of impingement of particles on collecting surfaces." Plaintiff's expert Duncan admitted that the "9° Kleenaire" was such a filter [R. 1427], which was confirmed by defendants' expert Russell [R. 1338].

Claim 5 includes "a plurality of sheets of crimped mesh screening members positioned with the sheets extending in the general direction of the intended flow through the panel of the medium to be filtered." Mr. Duncan admitted that the "9° Kleenaire" has such members [R. 1427], and this was confirmed by Mr. Russell [R. 1339].

Claim 5 specifies: "the crimp of said sheets being constructed and arranged to effect a multiple subdivision of the panel in both dimensions perpendicular to the general direction of flow of the medium to be filtered." Mr. Duncan admitted that the "9° Kleenaire" has such a construction [R. 1427].

Claim 5 requires that the screen members be constructed and arranged so as to form "passages the walls of which are composed of such mesh members, which passages extend through said panel." Mr. Duncan admitted that by reason of the arrangement of the corrugated screen members of the "9° Kleenaire" open zig-zag air paths, channels, or passages are formed through it [R. 1405-1406], which was confirmed by Mr. Russell [R. 1342-1344].

Mr. Duncan admitted that in the Kleenaire the walls of such passages "are composed of such mesh members" [R. 1427-1428], and confirmed by Mr. Russell [R. 1348-1349].

Claim 5 further provides for a portion of each of "said passages being disposed angularly with respect to a remaining portion of the passages." Mr. Duncan admitted that the open zig-zag passages of the "9° Kleenaire" change direction [R. 1428], which was confirmed by Mr. Russell [R. 1349].

It is plain that every element of the structure set forth in claim 5 of the Farr '479 patent in suit was present in the same alleged combination in the "9° Kleenaire" filter. The same is similarly true of claims 4, 7 and 8 in suit. There was no contrary evidence. This clearly demonstrates the error in Finding 29 [R. 1179] here in issue, and in original Finding 8 [R. 61].

The District Court to avoid a holding of invalidity of the Farr '479 patent in suit interpreted the term "passages" extremely narrowly, limiting such term by construction to mean the screen corrugations themselves [Finding 27, R. 1178], and thereby distinguishing from the "9° Kleenaire" filter in which the corrugations do not extend entirely through the filter [Finding 28, R. 1179]. In doing so, the District Court merely referred to the Farr '479 patent itself [R. 1441-1445], without recourse to any other evidence.

This Court, of course, can read the Farr '479 patent in suit as readily as the District Court, and, we suggest, there is absolutely nothing in the specification or the patent in suit to justify any reading of such limitations into the claims in issue which do not contain any such limitations. It is true that the drawing of the Farr patent in suit shows triangular passages 5 formed by the corrugations in the crimped screens 4 together with the flat intermediate screens 9. Likewise, the Farr specification plainly teaches that its air passages are formed by the crimped or corrugated screens "in cooperation with adjacent screen members" [R. 840, Col. 2, lines 19-24], and the only "adjacent" screen members disclosed in the Farr patent are the flat screens 9. If the claims in suit are to be limited by interpretation to such passages shown

and described in the patent they should be further limited to the inclusion of such flat screens, in which case the defendants' accused P-5 filter, which does not include any such flat screens, does not infringe the patent in suit. The claims in issue, we suggest, should not be interpreted narrowly to avoid invalidity and then broadly to find infringement. This demonstrates the clear error in Findings 27 and 28 [R. 1178-1179].

3. The Kleenaire Filters Operated in Substantially the Same Way as the Farr '479 Filter.

Plaintiff's expert Duncan made and fully tested a replica of the "9° Kleenaire" filter [R. 1379-1383]. He compared the operation of the Farr '479 filter with that of the "9° Kleenaire," frankly admitting the obvious similarities in their modes of operation [R. 1418-1423]. He pointed out that when both filters are clean, the air passes straight through both filters; as dust deposits on the screens the air goes down the open air passages of each until it finds clean screen and then goes on straight through each filter; in both there is a mixed flow of air, partly through the screens and partly down the passages; and in both the dust is deposited progressively deeper into the filter on the walls of the passages.

This mode of operation in both the Farr '479 filter and the "9° Kleenaire" filter is, we submit, exactly that specified by claims 4, 7 and 8 of the patent in suit, claim 4 describing such mode of operation as follows:

" . . . whereby the medium [air] may flow through the mesh of said [screen] members near the entrance of the panel when the filter is clean and partially through said passages and hence through the mesh of the members located progressively

towards the exit of the panel as the panel becomes loaded with [dust] particles.”

We, therefore, submit that the “9° Kleenaire” filter operated in substantially the same way as plaintiff’s filter covered by the Farr ’479 patent in suit, and that original Finding 4 [R. 59] and the new Finding 30 [R. 1179] are clearly erroneous.

4. The Results Obtainable With the “9° Kleenaire” Were Adequate.

The results obtainable with the “9° Kleenaire” were adequate and are fully comparable with those obtainable with the filter of the Farr ’479 patent in suit. Admittedly, the Kleenaire filter has somewhat lower average efficiency in removing dust and somewhat higher average pressure drop than the Farr filter, but the difference in results, we suggest, were merely differences in degree and not in kind.

Plaintiff’s expert Duncan made and tested a replica of a “9° Kleenaire” filter [R. 1379-1383], and his test results are shown in the graph Exhibit 54-B-2 [R. 1456]. This graph shows that for a dust load of 600 grams of dust the Kleenaire filter tested had an average dust removal efficiency of in excess of 70% and a pressure drop which started at 0.09” and rose to only 0.29”. Through the same range the Farr filter has an average dust removal efficiency of less than 75% and a pressure drop that started at 0.1” and rose to 0.13” [Ex. 13; R. 956-A]. Mr. Duncan made it clear that the Farr filter must be cleaned when the dust load rises to 500 or 600 grams of dust [R. 183-184], which may be considered as the normal operating life of such a filter before

cleaning is required. Within this range set by plaintiff's expert, the Kleenaire results are comparable with those of the Farr. Furthermore, the standards of the filter industry permit a pressure drop rise of up to 0.5" of water [R. 184-185, 339], and, obviously, the Kleenaire filter, which had a pressure drop rise to only 0.29" of water in such normal operating range, is well within the standards of the industry. There is absolutely no evidence in this case that the differences in efficiency or pressure drop between the Farr '479 filter and the Kleenaire filter, or, in fact, any other prior art filter, are in any way significant.

Mr. Duncan admitted that the "9° Kleenaire" replica tested by him had about the same operating characteristics and results as the prior art Air-Maze "Type B" filter [R. 1389-1390, 1393], and the uncontradicted evidence is that defendant Air-Maze has sold substantial quantities of such "Type B" filters in competition with the Farr filter [R. 333-334]. If such "Type B" filters are commercially saleable and acceptable, we suggest that the Kleenaire filter would likewise be acceptable with modern heating and ventilating equipment. The witness Meyer pointed out that while he had some difficulties in the early 1930's in keeping clean some of the Kleenaire filters that he used and sold, the reason for this was the inadequate propeller type fans they used with the filters at that early date and that with modern blower equipment the Kleenaire filters would be satisfactory [R. 1310-1311, 1314]. Mr. Meyer, at an early date, actually tested such Kleenaire filters with modern type blowers and found them satisfactory [R. 1323]. The witness Worth, the manufacturer of such Kleenaire filters, testified that he had no trouble with them [R. 1227].

The foregoing demonstrates the clear error in the District Court's Finding 26 [R. 1178] to the effect that the Kleenaire filters "had no utility." Such Kleenaire filters were extensively made, sold, and used, and some, at least, operated satisfactorily. By modern standards the Kleenaire filters would be adequate for ordinary heating and ventliating installations.

5. The Farr '479 Patent in Suit Is Invalid in View of the Kleenaire Filters.

As shown above, the Kleenaire filters embodied all of the elements of claims 4, 5, 7 and 8 of the Farr '479 patent in suit in the same combination, the elements operated in substantially the same way to produce comparable results. The mere fact that the Kleenaire filters may not have had as high an efficiency or as low a pressure drop as the Farr '479 filters does not rule them out as anticipations.

The law is clear that even an imperfect prior art device may invalidate a patent if the fact of prior use and sale is clearly established [it is admitted here] and if the prior art device embodied substantially the alleged invention covered by the patent in suit. *See: Brush v. Condit*, 132 U. S. 39, 10 S. Ct. 1, 33 L. Ed. 251 (1889); *H. Wenzel Tent & Duck Co. v. White Stag Mfg. Co.*, 199 F. 2d 740 (C. A. 9th, 1952).

It is, therefore, submitted that claims 4, 5, 7 and 8 of the Farr '479 patent in suit are clearly invalid because wholly anticipated by the Kleenaire filters.

6. The Farr '479 Patent in Suit Is Invalid Because It Covers a Mere Substitution of Materials.

In our Opening Brief of Appellants we pointed out (pp. 39-42) that the '479 patent in suit is invalid for lack of invention over the prior art Detroit Air Filter, as no invention was involved in merely substituting fly screen for cardboard in the Detroit Air Filter. Plaintiff's counsel conceded that if the Detroit Air Filter were made of wire screen instead of paper plaintiff would have no case here [R. 1134].

The prior art Kleenaire filters, made of fly screen and generally of the same construction as the filter covered by the Farr '479 patent in suit, plainly taught the use of such fly screen in such an air filter prior to the alleged invention of the patent in suit. In view of the prior Kleenaire filters, we reiterate that there was no invention involved in merely substituting such fly screen for the paper or cardboard in the Detroit Air Filter and that the patent in suit is clearly invalid as being no more than an obvious substitution of materials, under the authorities cited in our opening brief.

7. The Farr '479 Patent in Suit Is Invalid Over the "45° Kleenaire" Filter.

The District Court found [Finding 33, R. 1180] that defendants had not carried their burden of proof that the "45° Kleenaire," the filter media of which is shown in Exhibit CCC [R. 1458-1459], was ever actually made and sold. This, we submit, was clearly erroneous because the deposition testimony of the witnesses Worth and Flaig clearly establishes such fact [R. 1199, 1206-1211, 1232-1233, 1249-1250, 1270-1271].

However, regardless of whether Kleenaire filters with corrugations of 45° were ever actually sold, it is incontestable that such filters were *offered for sale* by the advertisements in Exhibit CCC [R. 1458-1459] and were illustrated in such printed publication in 1931 long prior to the alleged invention of the patent in suit, either of which facts may operate as anticipations to invalidate the Farr '479 patent in suit.

The particular pertinency of the " 45° Kleenaire" filter is that its wire screen filter media with its corrugations set at a 45° angle and reversed in direction, is substantially *identical* with the alternative forms of the Farr filter shown in Figures 3 and 5 [R. 951] of the abandoned Farr patent application Serial No. 285,904 upon which the application for the Farr '479 patent in suit was based. Plaintiff's counsel in the District Court conceded that the '479 patent in suit discloses only one form of Farr's invention, the other forms being shown in the abandoned Farr application Serial No. 285,904 [R. 1165-1168]. As plainly stated by Farr in his abandoned application [R. 994], the form shown in Fig. 3 was his "preferred form of construction." If the Farr filter shown in Fig. 3 of the abandoned application was merely an alternative form of the invention to the form shown in the '479 patent in suit, which is conceded by plaintiff (typewritten transcript, p. 1164), we suggest that the " 45° Kleenaire," which is substantially identical with such form shown in Fig. 3 of the abandoned application, is likewise an alternative to and equivalent to the filter of the '479 patent in suit. "Things which are equal to the same thing are equal to each other."

We, therefore, submit that the patentee Farr and plaintiff, by the admissions of its counsel, have established the substantial equivalency of the "45° Kleenaire" filter and the filter of the Farr '479 patent in suit and, we submit, the '479 patent in suit is, therefore, clearly invalid because anticipated by the Kleenaire filter.

8. The Farr '479 Patent in Suit Is Invalid for Lack of Invention Because It Is Merely for an Assemblage of Old Elements Which Operate in Substantially the Same Way to Produce the Same Results as They Did in the Prior Art.

This point was fully developed in our original Opening Brief of Appellant (pp. 27-38). There we pointed out that there was *no finding* by the District Court in this case that the old elements of the Farr '479 patent in suit "perform any additional or different function in the combination than they perform out of it," as required by the Supreme Court in *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, at 172. Such rule was adopted and followed by this Court in *Kwikset Locks, Inc. v. Hillgren*, 210 F. 2d 483, 100 U. S. P. Q. 289, at 291, stating:

"* * * The Supreme Court further requires that in order for a combination patent to be upheld, there must be a specific finding that the old elements which made up this device perform an additional and different function in combination, than they perform out of it. No such finding was made in the case at bar * * *."

This case has again been before the District Court, with the opportunity for it to make additional findings on this point, and yet the District Court has not done so.

We, therefore, respectfully reiterate that the judgment should be reversed upon the ground that the District Court has failed to make the findings of fact required by the Supreme Court and this Court to sustain the validity of the Farr '479 patent in suit which is otherwise for a mere assemblage of elements, all of which were old in the art.

IV.

Conclusion.

The alleged invention of the Farr '479 patent in suit was wholly forecast in the Kleenaire filters widely sold and offered for sale in the United States, and shown in printed publications, long prior to its earliest date of invention. Every element of claims 4, 5, 7 and 8 of the Farr '479 patent in suit was embodied in such Kleenaire filters, in which such elements operated in the same way to produce comparable results.

We submit that claims 4, 5, 7 and 8 of the Farr '479 patent in suit are, therefore, clearly invalid in law and that the judgment should be reversed.

Respectfully submitted,

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No. 13352

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES D. GRATIOT and AIR-MAZE CORPORATION,

Appellants,

vs.

FARR COMPANY, a corporation,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

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Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

This is an appeal by Appellants Jules D. Gratiot and Air-Maze Corporation from two judgments against them in a patent infringement action brought by Appellee, the Farr Company. The action was first tried before the Honorable Peirson M. Hall, United States District Judge for the Southern District of California, Central Division. The District Court's opinion [R. 819], judgment [R. 67] and conclusions of law [R. 65] held the claims in suit, Nos. 4, 5, 7 and 8 of Farr patent 2,286,479 valid and infringed by the Air-Maze P-5 air filter panel manufactured by Appellant Air-Maze and sold by Appellants Air-Maze and Gratiot. Appellee charged infringement of these four claims only [R. 14]. The judgment was en-

tered on February 26, 1952, and Appellants appealed therefrom, but after the filing of briefs and prior to the date set for final hearing Appellants filed a Motion to Reopen and Remand based upon purportedly newly discovered evidence which they asserted bore upon the issues of validity and infringement. On May 27, 1954, this Court entered an order remanding the case to the trial court to receive evidence relative to the bearing of a prior device known as the "Kleenaire Filter" upon the validity and infringement of the patent in suit and for making and filing findings of fact and conclusions of law and such further judgment, if any, as the trial judge deemed appropriate [R. 1186]. Thereafter on August 27, 1953, depositions of several witnesses relative to the Kleenaire filters were taken by Appellants in Stevens Point, Wisconsin. On October 19, 20, 1954, the further trial ordered by this Court was held and new findings of fact and conclusions of law and a judgment entered on November 19, 1954 [R. 1177-1182]. This new judgment provided that the evidence presented with respect to the Kleenaire filter required no modification of the original judgment of February 26, 1952, except that plaintiffs below were entitled to recover costs for the proceedings had pursuant to the Order to Reopen and Remand. Appellants have appealed from this new judgment and reappealed from the original judgment [R. 1183].

In its new Findings of Fact the District Court found that while certain Kleenaire filters had been made and sold prior to the date of invention of the Farr patent in suit [Finding 24, R. 1178]; such filters offered only cumulative evidence as respects other prior filters considered at the earlier trial and did not contain either the elements, the mode of operation or the new and surprising results

of the filter of the Farr patent in suit [Finding 32, R. 1180]; and that the Kleenaire filters had no utility [Finding 26, R. 1178]. The court also entered other and more detailed findings which will be considered hereafter pointing out the differences in structure, performance, and mode of operation between the Kleenaire filter on the one hand and the patented Farr filter and infringing Air-Maze filter on the other hand [R. 1178-1181]. While Appellants sought to establish prior manufacture and sale of variations of this Kleenaire filter (which variations are described in Appellants' Supplemental Brief as the "45° Kleenaire" filter) the trial court found that the evidence was insufficient to support a finding that any such variations were ever made or sold [Finding 33, R. 1180].

While this Brief is supplemental to the original Brief for Appellee, it is deemed necessary to briefly describe the structure, mode of operation and performance of the filter of the patent in suit and the infringing Air-Maze P-5 filter in order that the evidence presented with respect to the Kleenaire filter can be properly evaluated.

A. The Farr and Air-Maze P-5 Filters.

These are air filters, operating on the impingement principle, which utilize corrugated sheets of wire screens for the filter media. These sheets are set parallel to the general direction of air flow through the filter, and the corrugations, or crimps as they are frequently called in the record, form valleys which provide air passages extending through the filter independently of the openings of the screen mesh. These corrugated wire screen sheets are stacked one above the other to divide the filter panel both in the horizontal and vertical dimensions into a multiple of small passages. Nesting of the sheets is prevented in the case of the Farr filter by interposing flat

sheets of screen between the corrugated sheets, and in the case of the Air-Maze P-5 filter by reversing the angle of the corrugations of successive sheets. The corrugations are formed in a herringbone pattern, that is, with a sharp bend to provide an abrupt change in the direction of the corrugation and accordingly the air passage through the filter formed by the valley of the corrugation [R. 127, 128, 158]. An examination of the Farr filter [Physical Ex. 2] and the Air-Maze P-5 filter [Physical Ex. 12] demonstrates that in both filters the corrugations or crimps which form the passageways extend entirely through the filter, having open ends on each face of the filter, thereby permitting air to flow into and out of the filter down the passageway formed by the valley of each corrugation [R. 1372-1374]. In addition to the different expedients employed to prevent nesting of the corrugated sheets above described, the filters differ in structure only in that the corrugations of the Air-Maze P-5 filter have two bends or abrupt changes in direction rather than one as in the case of the Farr filter. The District Court found that these slight differences do not avoid infringement and that the two filters are essentially and basically the same [Finding 19, R. 64]. That such finding is not only fully supported by the evidence but, indeed, that the record contains no evidence which would support any finding to the contrary was demonstrated in Appellee's earlier Brief.

B. The Kleenaire Filter.

The Kleenaire filter is described in the bulletin Defendants' Exhibit HHH [R. 1460] and exemplified by physical Exhibits SSS and TTT. This filter is an air filter of the impingement type utilizing corrugated wire screens which are set parallel to the general direction of

the air flow through the filter, and the angle of the corrugations of successive sheets is reversed to prevent nesting of the sheets. Here, however, any material similarity to the Farr filter or to the Air-Maze P-5 filter ends. The valleys of the corrugations of the Kleenaire filter do not provide air passages extending through the filter since in every instance each corrugation dead-ends in the frame of the filter panel. In other words, while the valleys of the corrugations form air passages which extend through the filters of the Farr and the Air-Maze P-5 [R. 1372, 1373], one end of each corrugation, and hence the passage formed thereby, is blocked by the frame in the Kleenaire filter [R. 1374, 1360]. Moreover, in the Kleenaire filter media there is no bend or change of direction of the corrugation and hence no change in the direction of the passage formed by the corrugation [R. 1402].

Based upon extensive and (as will be shown herein) for the most part uncontradicted evidence, the District Court found that the Kleenaire filter did not have the new mode of operation of the filter of the Farr patent in suit and the Air-Maze P-5 filter [Finding 30, R. 1179]¹; that the new and surprising result of the Farr and Air-Maze filters of high efficiency in removing dust from the air combined with a low pressure drop which does not rise rapidly with dust load is not found in the Kleenaire filter [Finding 31, R. 1180];² that the Kleenaire filters were

¹In their Reply Brief Appellants asserted that the District Court had not found that the mode of operation of the filter of the patent in suit was *new*. Any uncertainty in this regard is eliminated by New Finding of Fact 30 [R. 1179].

²Appellants also asserted in their Reply Brief that the trial court had not found that the filter of the patent achieved a *new and surprising result*. New Finding 31 [R. 1180] answers this contention.

commercially unsuccessful and had no utility since they clogged up with dust within a short period of time [Finding 26, R. 1178]; that the Kleenaire filters do not include all the elements of the claims of the patent in suit nor the new combination of elements of such claims [Findings 28 and 29, R. 1179];³ and finally that the Kleenair filters offered only cumulative evidence of prior filters which did not contain either the elements, the mode of operation, or the new and surprising results of the filter of the Farr patent in suit which filter was not obvious to one skilled in the art either from the Kleenaire filters considered alone or in connection with the other prior art filters of record [Finding 32, R. 1180].

While, as above noted, Appellants sought to establish the manufacture and sale of modifications of the Kleenaire filter, the testimony offered was in deposition form only, lacked consistency and corroboration, was in conflict with an earlier affidavit of the principal deponent, and was found by the District Court to be insufficient to support a finding that any such modification had been made or sold [Finding 33, R. 1180].

The subject matter of the present action is such that while physical differences of the various filters in evidence may be apparent, their significance cannot be determined by mere visual observation. The reason, of course, is that we are dealing with matters such as paths of air flow and impingement of tiny particles of dust on collecting surfaces which cannot be determined satisfactorily by visual obser-

³Appellants asserted in their Reply Brief that the trial court had not found that the *combination* of the patent in suit was not disclosed in the prior art. New Finding 29 [R. 1179] expressly describes the patented combination as *new*.

vation. Consequently, the operation and performance of the various filters and the effect of physical differences between them can only be determined by carefully controlled comparative tests. In the earlier trial of this action each of the parties introduced in evidence a number of such tests in the form of comparative test data obtained by their respective expert witnesses to demonstrate the performance of the filter of the Farr patent in suit, the Air-Maze P-5 filter and various of the prior art filters relied upon by Appellants. Appellants' witness Rowley and Appellee's witness Duncan testified at length as to the significance of the various test results and demonstrated by their testimony the need for such tests if the performance and operating characteristics of different filters are to be compared. Indeed, as pointed out on page 16 of Appellee's earlier Brief, in 1937 the witness Rowley had been employed to conduct an elaborate series of such tests of all commercially available filters for the Association of American Railroads, the results of which are contained in Plaintiff's Exhibit 27. Moreover, during the earlier trial the parties conducted certain joint tests on equipment provided by Appellee to insure uniformity of results since different test dusts had been used in their respective *ex parte* tests. In spite of the critical necessity for such tests for an accurate comparison of performance characteristics of filters of the type here involved, and despite the fact that Appellants had in their possession two Kleenaire filters [Exs. SSS and TTT], Appellants introduced no evidence whatever of performance tests of Kleenaire filters. Moreover, when asked to compare the operating characteristics of these Kleenaire filters with those of the Air-Maze P-5 filter or of the Farr filter of the patent in suit, Appellants' expert witness Russell stated that he was not prepared to

do so since he had not tested the same [R. 1361]. In view of the need for comparative tests if an honest and accurate determination of the performance and operation of the Kleenaire filter was to be made in order that the trial court could make a realistic comparison of such filter with the Farr filter and Air-Maze P-5 filter, Appellee suggested a joint test of the Kleenaire filter [R. 1369, 1393]. Appellants declined to enter into such a joint test [R. 1396] and while stipulating to the correctness of the results of the tests set forth in Appellee's Exhibit 54-B-2 declined to so stipulate as to Appellee's Exhibit 54-B-1 [R. 1394]. Moreover, Appellants' counsel advised the court that he had his own test results [R. 1368] but did not introduce the same into evidence nor offer any explanation for such omission nor any testimony with respect thereto. Accordingly, the performance characteristics of the Kleenaire filter as demonstrated by Appellee's Exhibits 54-B-1 and 54-B-2 stand stipulated as to the former and uncontradicted as to the latter.

II.

SUMMARY OF ARGUMENT.

For the convenience of the Court, Appellee will reply to the contentions made in Appellants' Brief in the order in which they are presented by the Appellants and the following is presented simply as a short summary of the argument to be made by Appellee:

1. The evidence amply establishes that the Kleenaire filter does not embody the essential elements of the Farr

'479 patent in suit in view of both the structural differences between the two filters and the very marked differences in their operating characteristics and performance.

2. As properly construed in the light of the specification and drawings, the claims in suit of the Farr patent clearly distinguish over the Kleenaire filter.

3. The evidence establishes that the performance of the Kleenaire filters is markedly inferior to that of the Farr filter and that the two filters do not have the same mode of operation.

4. The evidence shows that the Kleenaire filters were unsuccessful since unsatisfactory for their intended purpose, and accordingly had no real utility.

5. The Kleenaire filters do not embody the invention of the Farr patent in suit, do not embody all of the elements nor the new combination of elements of the claims of the Farr patent in suit, and the Kleenaire filters differ in structure, mode of operation and are decidedly inferior in result to the filters of the Farr patent in suit.

6. The Farr patent in suit covers a difference in structure rather than a substitution of materials over the prior art and produces a new, unexpected and surprising result.

7. The evidence fails to establish that any Kleenaire filters were ever made or sold having air passages formed by the corrugations of screen members which extended through the filter.

8. The Farr patent in suit is a new combination of elements which have a new mode of operation and which achieve new and surprising results.

III. ARGUMENT.

Introduction.

The points raised by Appellants will be considered separately in sections, which for the convenience of the Court will be numbered to correspond to the order in which they are presented in Appellants' brief. Since, however, many of the statements and conclusions expressed by Appellants are in direct conflict with the results of the tests [Exs. 54-B-1 and 54-B-2, R. 1455, 1456], such results will first be considered in order to avoid needless repetition. Exhibits 54-B-1 and 54-B-2 contain the results of tests conducted by Appellee's expert witness Duncan on a simulated Kleenaire filter. Appellee did not have available a genuine Kleenaire filter [R. 1379]. This simulated filter, however, was stipulated by Appellants to be substantially the same as the actual Kleenaire filter [R. 1381, 1382]. As above noted, Appellants also stipulated as to the correctness of Exhibit 54-B-2 [R. 1394]. While Appellants declined to stipulate as to the accuracy of Exhibit 54-B-1, this Exhibit stands uncontradicted in the record since Appellants offered no evidence to dispute the same, and indeed, even declined an invitation by Appellee to join in inter-partes tests.

As above noted, much of the testimony of the first trial was devoted to comparisons of the performance and operating characteristics of the various filters involved as determined by tests made by the expert witnesses. The important performance characteristics of filters of the type under consideration are pressure drop of the air passing through the filter, the efficiency of the filter in removing dust from the air, and the variations or changes in these

factors as the dust load accumulates in the filter [R. 114-116]. Appellee's witness Duncan described in some detail the test procedures which Appellee employs to determine these characteristics [R. 118-124], and introduced the results of tests made by him on the filter of the Farr patent in suit, the infringing Air-Maze P-5 filter and several prior art filters which had been asserted by Appellants against the patent [Exs. 11, 13, 29, 30, 31]. In like manner, Appellants' witness Rowley testified at length as to test procedures for determining these filter characteristics [R. 479-488] and Appellants introduced in evidence a number of charts showing test results, and consequently the operating characteristics of the filter of the Farr patent in suit, the Air-Maze P-5 filter and several prior art filters [Exs. HH, MM, VV, XX and ZZ].

The testimony offered by both parties demonstrated that the true operating characteristics of filters of the type under consideration cannot be determined by mere visual inspection but require tests under carefully controlled test procedures and in specially designed equipments. As noted above this requirement was most forcefully demonstrated by the testimony of Appellants' expert witness Russell who, when asked whether he was prepared to compare the operating characteristics of the Kleenaire filter with those of the Air-Maze P-5 filter or of the Farr filter of the patent in suit, testified simply, "No I am not" [R. 1361]. Russell could make no such comparisons since he had not tested the Kleenaire filters [R. 1351, 1361].

In order that this Court may appreciate the significance of the arguments which follows, there will now be described briefly the operating characteristics of the Kleenaire filter as established by Exhibits 54-B-2 and 54-B-1

and a comparison of these operating characteristics with those of the filter of the Farr patent in suit and the infringing Air-Maze P-5 filter.

Considering first Exhibit 13 [R. 956A] and Exhibits 54-B-2 [R. 1456], Appellee's witness Duncan testified that in obtaining the data for these Exhibits, the same test dust was used and the same test procedure was employed except that the test shown in Exhibit 13 was run at 1200 cubic feet of air per minute through the filter and that of Exhibit 54-B-2 was run at 800 cubic feet of air per minute [R. 1383-1385. The only effect of this difference of air flow was that had the test of Exhibits 54-B-2 been run at the higher rate of air flow, both curves of 54-B-2 would be somewhat higher on the chart, that is the efficiency and pressure drop curves would be a little higher [R. 1386]. Duncan pointed out that as shown on Exhibit 13, the pressure drop of the Farr filter started at approximately 0.1 inches of water and increased to approximately 0.15 inches at the end of the test (the test being continued to a dust load of approximately 1,000 grams) and that the Kleenaire filter started at the same pressure drop of 0.1 inches of water but rose to over .5 inches at the end of the test (the test only being continued to the lesser dust load of approximately 780 grams). This marked increase in pressure drop (resistance to the flow of air through filter) took place quite rapidly in the Kleenaire filter showing that the filter was loading on its face rather than progressively loading as in the case of the Farr filter [R. 1389], and that the two filters do not operate in the same fashion [R. 1392-1393]. Duncan next compared the performance of the Kleenaire filter with the old Air-Maze "Type B" filter [Physical Ex. 5] (wherein the air

can only pass perpendicular to and hence through the sheets of the screen rather than parallel to and hence along the sheets of the screen as in the case of the filter of the Farr patent in suit and the Air-Maze P-5 filter [R. 140-142]). The performance characteristics of the Type B filter are shown in Exhibit 11, and Duncan had earlier testified that this exhibit demonstrated that the Type B filter did not have the characteristics performance of the Farr filter [R. 146] and that a different type of operation was taking place in the collection of dust by the two filters [R. 148], this difference being shown principally by the difference in the shapes of the curves of the two pressure drop curves [R. 147]. The tests of the Air-Maze Type B filter and the Kleenaire filter, shown in Exhibits 11 and 54-B-2 respectively, were run under the same conditions, including the same air flow [R. 1390-1391] and the results of these tests were very similar, the slight difference being that the Kleenaire filter showed an *earlier* increase in pressure drop than the Air-Maze Type B [R. 1391]. These tests established that the pressure drop characteristic of the Kleenaire filter was almost the same as the old Air-Maze Type B filter [R. 1393]. The above conclusions were confirmed by Duncan by repeating the test with a different type dust [R. 1395] from which Exhibit 54-B-1 [R. 1455] was obtained. Exhibit 54-B-1 was compared to Exhibit 31 which shows the test results using this different type dust with the filter of the Farr patent in suit [R. 1396]. Such comparison agreed with that previously described [R. 1396]. It should be noted that Exhibit 31 represents the results of joint tests performed by the witnesses for the parties [R. 728]. Also during the earlier trial of this action it was established by tests that the infringing Air-Maze P-5 filter has the same

characteristic performance as the filter of the Farr patent [R. 161-166, 173.]

The above tests demonstrate conclusively that the Kleenaire filter operated differently and did not achieve the new result of the filter of the Farr patent in suit. The marked increase in pressure drop with dust load establishes that dust loads on the face of the Kleenaire filter rather than progressively loading through the depth of the filter as in the case of the Farr filter and the Air-Maze P-5 filter. Of striking significance, this characteristic of the Kleenaire filter established by the tests was fully confirmed by Appellants' own witness Meyer, the only witness produced at the trial who had ever used a Kleenaire filter. Thus, Meyer after testifying that he discontinued the use of Kleenaire filters after trying them for one heating season [R. 1316] testified, "That was the trouble. It wasn't they didn't filter, but got dirty so quick that I had to give them steam baths all the time." [R. 1325.]

1. The Essential Elements of the Patent in Suit Are Not Found in the Kleenaire Filter.

The first point urged by Appellants is that the Kleenaire filters embody all of the essential elements of the filter of the Farr patent in suit. This contention is, of course, unsupportable in view of the comparative test results obtained as to the two filters in evidence which demonstrate that the performance characteristics of the Farr filter are markedly superior to those of the Kleenaire filter and that the two filters do not even have the same mode of operation [R. 1389, 1392, 1393]. As above noted, the Farr filter operates by progressive loading so that the dust accumulates through the depth of the filter as the dust load increases with the result that undesirable

increases of pressure drop with dust load is slight. On the other hand, the Kleenaire filter, like the old Air-Maze Type B filter, is a face loading filter, the dust collecting on the face of the filter causing a very marked increase in pressure drop as the dust load accumulates. If the "essential elements" of the filter of the patent in suit were embodied in the Kleenaire filter these marked differences in performance and result could not occur.

Essential to the filter of the Farr patent are a plurality of sheets of crimped or corrugated wire screens arranged generally parallel to the direction of air flow which subdivide the filter in both dimensions and form air passages through the filter which are independent of the openings in the screen. These air passages are formed by the valleys of the corrugations and result in the progressive loading feature of the patented filter. This progressive loading has been described in Appellee's earlier Brief on pages 13 through 15, and is illustrated in Appellee's Photographic Exhibits 9A through 9J. If progressive loading as distinguished from face loading is to be accomplished, it is necessary that the passages for the flow of air extend through the filter and accordingly that they be open at both ends of the filter [R. 1377]. The Kleenaire filter, while constructed of crimped or corrugated sheets of screen, with the sheets generally parallel to the flow of air, has the angle of each crimp or corrugation so designed that one end or the other thereof terminates or dead-ends in the filter frame.⁴ Consequently, the

⁴While this structural difference might appear to be slight from a mere visual comparison of the two filters, it is in fact critical to their performance and mode of operation as shown by the differences in results of the comparative tests, thus demonstrating the absolute necessity for performance tests if an accurate comparison is to be made between filters of the type here involved.

passages formed by the valleys of the corrugations do not extend through the filter. This was conceded by the Appellants' expert witness Russell who testified that there were no passageways at all in the Kleenaire filter formed by the crimp of the metal [R. 1358]. This difference is a critical one since it results in a face loading filter rather than a progressive loading filter [R. 1377, 1378] and causes the undesirable rapid increase of pressure drop with dust load shown by the above-described tests to take place in the Kleenaire filter.

As pointed out in Appellee's original Brief, pages 52 and 53, the passages formed by the valleys of the crimps or corrugations which extend through the filter, and the progressive loading accomplished thereby are, of course, present in the Air-Maze P-5 filter and are described in Air-Maze catalog [Pltf. Ex. 4].

In addition to the above, the corrugations or crimps of the mesh screen members of the filter of the Farr patent in suit and of the Air-Maze P-5 filter abruptly change in direction to create turbulence of air flow. The corrugations of the Kleenaire filter have no change in direction whatever [R. 1402]. This, too, was conceded by Appellants' witness Russell [R. 1360].

Appellants seek to establish the presence of "passages" in the filter because, as demonstrated in Appellants' Exhibit VVV, air could flow over and under the corrugations of the screen members from the front to the back of the

Kleenaire filter.⁵ As above noted, the passages of the filter of the Farr patent in suit (and of the Air-Maze P-5 filter) which result in the progressive loading characteristic of these filters are the valleys of the corrugations which extend through the filters which are formed by the walls of the corrugations. That the “over and under” openings of the Kleenaire filter are entirely different and that they do not provide the passages of the Farr and Air-Maze P-5 filters is, of course, demonstrated by the above-noted tests which establish that the progressive loading accomplished by the filter of the patent in suit and the Air-Maze filter does not take place in the Kleenaire filter and that the Kleenaire filter is a face loading filter. Moreover, the tests establish that the Kleenaire filter does not possess the surprising result of the filter of the Farr

⁵Appellants are now taking a completely inconsistent position in connection with these paths over and under the corrugations. As described in detail in Appellants' Opening Brief, commencing at page 20, the Air-Maze P-5 filter does not include an alternate flat screen sheet and successive sheets are laid together so that the corrugations are reversed in direction so as to avoid nesting. As in the Farr filter, *the valleys of the corrugations or crimps of the screen members form passages through the filter.* However, this arrangement results also in the presence of the same over and under paths found in the Kleenaire filter. Appellants urged (although contrary to the test results above described) that this indicated a different mode of operation between the patented filter and the Air-Maze P-5 filter and that infringement was avoided. Appellants apparently would have this Court hold on the one hand that the Kleenaire filter anticipates the patent in suit because, while it does not contain passages through the filter formed by the valleys of corrugations extending through the filter, it has possible paths for air flow over and under the crests of the corrugations, and on the other hand that the Air-Maze P-5 filter does not infringe the patent in suit because, even though, like the Farr filter, it has the air passages formed of the valleys of corrugations extending through the filter, it also has present the over and under air paths between corrugations.

patent of a high efficiency in removing dust from the air maintaining at the same time a relative low pressure drop across the filter [R. 1377-1379]. That the over and under (or zig-zag) paths formed by two valleys of the corrugations of the Kleenaire filter coming together to form an opening are not the passages required for the performance of the filter of the Farr patent in suit was further demonstrated by Duncan who testified, without contradiction, that if the same size filters and the same packing were employed there would be only about one-tenth as many of the zig-zag openings in the Kleenaire filter as there are passages formed by the corrugations in the Farr filter [R. 1434].

The District Court found that the Kleenaire filter does not have the new mode of operation of the filter of the Farr patent in suit and of the Air-Maze P-5 filter since the dust load accumulates on the face of the Kleenaire filter whereas in the Farr and Air-Maze P-5 filters the dust accumulates progressively along the walls of the passages formed by the corrugations which extend through the filter and which change in direction to cause turbulent flow of air through the passages and through the mesh of the screen despite increasing dust load [Finding 30, R. 1179]. The District Court also found that the Kleenaire filter did not achieve the new and surprising results of the Farr and Air-Maze P-5 filters since the Kleenaire filter did not have high efficiency in removing dust from air and also a low pressure drop which did not increase rapidly, but rather the pressure drop of the Kleenaire filter rose so rapidly with dust load that the filters became clogged in a short period of time [Finding 31, R. 1180]. These findings of fact are not only supported by substantial evidence but further, the record does not contain any

evidence which would sustain any contrary findings. Accordingly, there is no basis for Appellants' contention that the Kleenaire filters embodied all of the essential elements of the filter of the Farr patent in suit.

2. The Kleenaire Filters Do Not Disclose the Combination of Elements of Claims 4, 5, 7 and 8 of the Patent in Suit.

Appellants next urge that the so-called "9° Kleenaire" filter (those conceded to have been made and sold) embodied all of the elements of the claims in suit of the Farr patent. This contention is, of course, contrary to the specific finding by the District Court that if the Kleenaire filter had been subsequent to the Farr patent in suit the Kleenaire filter would not infringe the patent [Finding 29, R. 1179]. This finding is fully supported by the evidence since, for example, claim 5 (the claim discussed by Appellants) calls for crimped mesh screening members being constructed and arranged so as to form "passages, the walls of which are composed of such mesh members, which passages extend through said panel." This critical element is not found in the Kleenaire filter.

It is axiomatic that the claims of a patent must be construed and interpreted in the light of the specification and drawings of the patent. (*Schriber-Schroth Co. v. Cleveland Trust Co.* (U. S., 1940), 311 U. S. 211, 85 L. Ed. 132; *McRoskey v. Braun Mattress Co.* (C. A. 9, 1939), 107 F. 2d 143.) This rule was applied by the trial court [R. 1442-1445] which found that the term "passages" in Claims 4, 5, 7 and 8 of the Farr patent in suit, when read in the light of the specification and drawings of the patent, means the valleys of the corrugations in the mesh screening members and the terms "passages

changing direction,” “passages being disposed angularly,” and “passages changing abruptly in direction” employed in these claims mean an angle in the valleys formed by the corrugations [Finding 27, R. 1178]. The District Court further found that the Kleenaire filters do not have these passages called for by the patent claims since the valleys of the corrugations in the mesh screening members of the Kleenaire filters have no change in direction and have one end or the other ending in the frame with the result that such valleys do not extend through the filter [Finding 28, R. 1179].

An examination of the patent specification and drawings demonstrates that the lower court properly construed the claims and that Finding 27 is correct. Thus, the word “passages” is repeatedly used throughout the descriptive portion of the patent. For example, the patent states:

“Certain of the screen wire members 4 of the filter panel are crimped or corrugated as indicated, in Figure 3, to provide in cooperation with adjacent screen members air passages 5 leading from the front to the rear of the air panel” [p. 1, col. 2, line 21].

Reference to the numeral five in Figure 3 of the patent shows that the air passages described are the valleys of the corrugations.

“The screen members 4 are so crimped that the resulting air passages 5 are at angles to lines normal to the face of the filter panel so as to cause the air flowing through such passages to change in direction” [p. 1, col. 2, line 29].

“. . . said air passages are indicated as changing in direction as indicated at 6, which change in direction is preferably somewhat abrupt” [p. 1, col. 2, line 37].

As seen in Figs. 3 and 4, the reference numeral six indicates the sharp bend of the corrugation.

On page 1, column 2, lines 49 and 52 of the patent reference is made to "entrance portions 7 of the passages" and "exit portions 8 of the passages," and in Fig. 3, the reference characters 7 and 8 indicate the two ends of the valleys formed by the corrugation.

Further, on page 2, column 1, line 16, the patent states:

"it will be seen that there are provided passages for flow of air through the maize of screen wire filter members, such as by the flow of air through one of the entrance passages 7 and out of the connecting exit passage 8."

The drawings of the patent show that the described flow of air is in the valleys formed by the crimps or corrugations of the screens.

"By the construction shown, however, where the walls forming the passages 7 and 8 are foraminous in character, each opening in said walls acts itself for efficient collection of dust" [p. 2, col. 2, line 9].

"As the filter becomes progressively loaded with dust, the air travels successively further down the passage 7 before flowing through the openings in the screen forming the passage" [p. 2, col. 2, line 22].

Next the patent describes [p. 2, col. 2, lines 33-46] the function of the abrupt turn "in the passage provided between the entrance and exit portions 7 and 8," stating that this abrupt turn causes the air to flow "through the walls of such passages" rather than "in a stream through the passages 7 and 8."

From the foregoing there can be no question as to the intended meaning of the word "passages." This term

manifestly is used to refer to the valleys of the corrugations in the mesh screening members. Moreover, the provision in claim 5, "a portion of each of said passages being disposed angularly with respect to a remaining portion of the passages" obviously refers to the angle in the valleys formed by the abrupt bend in the corrugations.

In support of their contention that the "passages" called for by the claims in suit are found in the Kleenaire filter, Appellants on page 11 of their Supplemental Brief refer to the testimony of Russell [R. 1342-1344]. Russell's testimony was based only on certain statements (referring to the zig-zag or over and under channels) contained in the Kleenaire bulletin [Ex. HHH]. Russell nowhere testified that these channels were "passages" within the meaning of that term as used in the Farr patent in suit, nor did Appellants even interrogate Russell along such lines. On the other hand, Appellants on cross-examination asked the witness Duncan where in claim 4 anything is said about the crimps extending through the panel, and after being instructed by the lower court that he was entitled to read the claim in connection with the specification and drawings, Duncan stated, "the words 'thereby forming passages extending through said filter' require that the passages formed by the troughs of the crimp extend through the filter" [R. 1424-1426]. Further, the witness Duncan testified that in the language of the patent the Kleenaire filter did not contain mesh screening members constructed and arranged to form passages extending through the filter nor passages having walls composed of mesh members nor passages changing direction [R. 1427, 1428].

Not only is the construction of the claims in suit by the District Court correct in view of the specification and

drawings and confirmed by the only filter expert who testified on the question, but is in accord with the principle long established by the Supreme Court:

“The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed.”

Klein v. Russell (1873), 86 U. S. 433, 22 L. Ed. 116, 124.

See also:

Voices v. Uneeda Doll Co. (C. A. 2, 1929), 32 F. 2d 673;

Black & Decker Mfg. Co. v. Baltimore Truck Tire Serv. Corp. (C. A. 4, 1930), 40 F. 2d 910;

Jensen-Salsbery Lab. v. O. M. Franklin Blackleg S. Co. (C. A. 10, 1934), 74 F. 2d 501.

Accordingly, Appellants' contention that the Kleenaire filter embodies all of the elements of the patent in suit is without merit.

3. The Kleenaire Filters Have a Different Mode of Operation Than the Filters of the Farr Patent in Suit.

Appellants next describe the progressive loading feature of the filter of the Farr patent in suit and make the bald assertion that the Kleenaire filters operated in substantially the same way. The only evidence relied upon by Appellants in support of this contention is the testimony of Appellee's witness Duncan, appearing on pages 1418-1423 of the record. Examination of Duncan's testimony fails to disclose even the slightest suggestion that the two filters operate in the same way. Moreover, this completely un-

founded contention of Appellants is in direct contradiction to Duncan's testimony that the type of loading which would take place in the Kleenaire filter is "surface or face type loading" as distinguished from the progressive loading of the patent in suit and the Air-Maze P-5 filter [R. 1377, 1378]. Duncan further testified, "This increase in resistance (of the Kleenaire filter) takes place quite rapidly, showing that the filter was loading on its face and not following the progressive loading described as a property of the Farr filter" [R. 1389]. This testimony is, of course, fully substantiated by the operating characteristics of the filters established by the results of the tests above described.

The trial court found that the filter of the Farr patent in suit has a *new* mode of operation in that the dust accumulates progressively along the walls of the passages formed by the corrugations which extend through the filter and which change in direction thereby permitting turbulent flow of air through the passages and through the mesh of the screen despite increasing dust load; that the Air-Maze P-5 filter has the same new mode of operation; and that in the Kleenaire filters the dust accumulates on the face of the filters and accordingly the Kleenaire filters did not have this mode of operation [Finding 30, R. 1179]. This finding is fully supported by the evidence. Appellants' unfounded assertion that the Farr '479 filter and the Kleenaire filter operate in substantially the same way is obviously mere make-weight and not deserving of serious consideration by this Court.

4. The Kleenaire Filters Were Not Satisfactory for Their Intended Purpose and Had No Real Utility.

Appellants next assert that “the results obtainable with the ‘9° Kleenaire’ were adequate and are fully comparable with those obtainable with the filter of the Farr ’479 patent in suit” (Supp. Br. p. 15). The contention that the results obtainable with the two filters are comparable is contrary to all the evidence in the case and in direct conflict with the uncontradicted test results of Exhibits 54-B-1 and 54-B-2. Moreover, Appellee’s witness Duncan testified that the Kleenaire filter did not give the surprising result of high efficiency in removing dust from the air, *maintaining* at the same time a relatively low pressure drop across the filter [R. 1379], and Appellants’ witness Russell conceded in response to a question by the trial court that the Kleenaire filters would “clog up quicker than the others” [R. 1362] and that his experience indicated that the characteristics of the Air-Maze P-5 filter is about the same as the Farr filter but that the Kleenaire would have a more rapid increase in resistance with gathering dust load [R. 1367].

In spite of this testimony, Appellants attempt to persuade this Court that the results of the two filters are comparable by a misleading comparison of the results obtained up to a dust load of only 600 grams, stating: “Mr. Duncan made it clear that the Farr filter must be cleaned when the dust load rises to 500 or 600 grams of dust” [R. 183, 184]. This paraphrasing of Duncan’s testimony is inaccurate and misleading in the extreme. Duncan testified only that the Farr Company recommends

that filters be cleaned at about 600 grams. As shown by the uncontradicted testimony of Richard Farr, dust loads far in excess of 600 grams are regularly encountered in commercial practice [R. 286, 287]. Further attempting to justify their misleading comparison, Appellants assert that “the standards of the filter industry permit a pressure drop rise of up to 0.5 inches of water [R. 184, 185, 339],” and from this assert that the 0.29 inches pressure drop of the Kleenaire filter at 600 gram dust load shown on Exhibit 54-B-2 [R. 1456] (as compared to the 0.11 inches pressure drop of the Farr filter at this same dust load shown by Exhibit 13 [R. 956A]) is not significant. Again, Appellants’ analysis of the testimony is very misleading. Duncan testified merely that in most ventilating systems a half inch of pressure drop would be perfectly satisfactory [R. 184, 185] and Appellants’ witness Waterson testified that commercial and industrial air conditioning systems “permit up to a half inch of water resistance when the filter is dirty” [R. 339]. As explained by the witness Richard Farr, however, it is the *rate of increase* of pressure drop which is detrimental as it unbalances a system resulting in inadequate cooling in a ventilating system, loss of horsepower and bad smoking in the case of Diesel engines, and overheating and possible burning out of the firebox of a heating system [R. 284-286].

In addition to its structural differences, greatly inferior performance and different mode of operation, the lower court found that the Kleenaire filters had no utility since

they accumulated a dust load on the front face of the filter and within a short period of time clogged up and would not work [Finding 26, R. 1178]. Appellants attack this finding on the ground that the blowers in use at the time the Kleenaire filters were used were not adequate. Be that as it may, the only witness produced at the trial who had ever used a Kleenaire filter testified that he discontinued handling them because they had too much resistance to the air [R. 1310, 1314], that they had to be cleaned within a week or ten days [R. 1315], that he even removed and discarded the filters from his own plant less than a year after they were installed [R. 1316, 1317]; that the filters became coated with dust and slowed down the air flow [R. 1320, 1325]; and finally that people wouldn't pay the price of the Kleenaire filter and still have the service work in cleaning it [R. 1326].

In view of this uncontradicted testimony, the evidence fully supports the District Court's finding that the Kleenaire filter had no utility.

Based on testimony strikingly similar to that in the instant case, this Court has recently held that a prior device could not be used to anticipate or negative invention of a patent. Thus, in *Stearns v. Tinker & Razor* (C. A. 9, 1955), 220 F. 2d 49, the alleged prior user testified that his device was unsatisfactory and was discarded in favor of a different device. The Court stated, 220 F. 2d at 55:

“The evidence does not show use, commercial or otherwise, but shows only unsuccessful experiments; and such experiments cannot anticipate or negative invention.”

5. The Kleenaire Filters Do Not Anticipate the Farr Patent as They Differ in Structure, Mode of Operation and Result.

Appellants next simply reassert their contentions of points 2 through 4 of their Supplemental Brief (pp. 10-16) and state that the mere fact that the performance of the Kleenaire filters was inferior to the Farr '479 filters (lower efficiency and higher pressure drop) does not rule them out as anticipations since imperfect prior art devices may invalidate a patent. It should be noted that Appellants omit any reference to a third important operating characteristic of the filter of the Farr patent in suit not found in the Kleenaire filters—small rise in pressure drop as the dust load accumulates on the filter [R. 1389]. Appellee has shown herein that these contentions of Appellants find no support in the evidence and that the findings of the trial court to the contrary are fully supported by the record. Thus, the Kleenaire filter does not embody all the elements of claims 4, 5, 7 and 8 of the patent, nor does the Kleenaire filter operate in the same way as nor produce comparable results to the filter of the Farr patent. Accordingly, the Kleenaire filters do not anticipate the Farr patent in suit on no less than three independent grounds:

(A) The Kleenaire filter does not embody the elements of the claims in suit [Findings 27, 28 and 29, R. 1178, 1179], hence it does not anticipate the Farr patent. It is well settled that:

“in order to negative novelty or, as it is usually expressed, to ‘anticipate’ an invention, it is necessary that all of the elements of the invention or their equivalents be found in one single description or structure where they do substantially the same work in substantially the same way. [*Imhaeuser v. Buerk*,

101 U. S. 647, 660, 25 L. Ed. 945 (1879); *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68 (1878); *Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co.*, 215 Fed. 362, C. C. A. 8 (1916); *Dow Chem. Co. v. Williams Bros. Well Treating Co.*, 81 F. (2d) 495, 501, C. C. A. 10 (1936); *Universal Oil Products Co. v. Winkler-Kock E. Co.*, 6 F. Supp. 763, 770, D. C., D. Del. (1934), Aff'd 7 F. (2d) 991, C. C. A. 3 (1935).]"

Walker on Patents (Deller's Ed., 1937), Vol. 1, p. 255.

This rule has recently been recognized by this Court in *Jacuzzi Bros. v. Berkeley Pump Co.* (1951), 191 F. 2d 632 at 637:

"A true combination which performed a new function necessarily must be found as a whole in a prior patent or publication in order to accomplish destruction of a grant of monopoly."

(B) The Kleenaire filter does not possess the new mode of operation of the filter of the Farr patent or attain its new and useful results [Findings 30, 31, R. 1179, 1180] and accordingly does not anticipate the patent.

"To change the form of an existing machine, and by means of such change to introduce and employ other mechanical principles or natural powers, or, as it is termed, a new mode of operation, and thus attain a new and useful result, is the subject of a patent."

Winans v. Denmead (1853), 14 U. S. 330, 341, 14 L. Ed. 717, 721.

"A device which does not operate on the same principle cannot be an anticipation."

Los Alamitos Sugar Co. v. Carroll (C. A. 9, 1909), 173 Fed. 280, 284.

(C) The Kleenaire filter does not achieve the new and surprising results of the filter of the Farr patent [Finding 31, R. 1180] and accordingly does not anticipate the patent. See *Webster Loom Co. v. Higgins* (1882), 105 U. S. 580, 26 L. Ed. 1177, and other decisions referred to on pages 60-62 of original Brief for Appellee.

6. The Farr Patent in Suit Is Not a Mere Substitution of Materials but Differs in Structure From Prior Filters and Achieves a New and Surprising Result.

This assertion was fully met in the original Brief for Appellee (pp. 63-67) wherein it was pointed out that the filter of the Farr patent in suit was a change not only of materials but a change of structure resulting in a device having an entirely different mode of operation than the Detroit paper air filters. Moreover, as shown by the cases there cited, even were the case presented merely one of substitution of materials, in view of the new and unexpected results and the different mode of operation, the Farr patent would constitute a patentable invention over the Detroit filter.

Appellee has shown herein that the findings of the lower court of the differences in structure, mode of operation and results between the Farr filter and the Kleenaire filter are fully supported by the evidence. No additional testimony whatever was introduced by Appellants involving the Detroit paper air filters or any relation between them and the Kleenaire filters. Moreover, as pointed out in Appellee's original Brief, the Patent Office has already decided, during the prosecution of the patent in suit, that the Farr patent constitutes invention over the Detroit air filters, and, as stated by this Court:

“And the presumption that a patented combination is new and useful and embodies invention has added force where, as here, it appears that the patents relied upon as showing anticipation were considered by expert patent office officials. While their judgment is not absolutely binding on a court, it is entitled to great weight and is to be overcome only by clear proof that they were mistaken and that the combination lacks patentable novelty.”

J. A. Mohr & Son v. Alliance Securities Co. (C. C. A. 9, 1926), 14 F. 2d 799, 800.

Since no additional testimony whatever was introduced by Appellants on this question, the lower court properly found:

“The Kleenaire filters so made and sold offer only cumulative evidence of the manufacture prior to the invention of the Farr patent in suit of filters made of wire screen which did not contain either the elements, the mode of operation, or the new and surprising results of the filter of the Farr patent in suit, and the filter of the Farr patent in suit was not obvious to one skilled in the art either from such Kleenaire filters considered alone or in connection with the other prior art of record such as the Detroit paper filters.” [Finding 32, R. 1180.]

7. The So-called “45° Kleenaire” Filter Was Neither Established by Evidence nor Does the Same Have Any Bearing on the Issues Here Presented.

Appellants attempted to establish the prior manufacture and sale of filters which were said to differ from the Kleenaire filters of Exhibits SSS and TTT in that the angle of corrugations in the filter media was less steep. In this manner Appellants hoped to establish that Kleenaire filters having passages formed by corrugations ex-

tending through the filter had been made and sold. It should be noted that no attempt was made to establish that any such filters were ever made or sold having an abrupt change in direction of the passage formed by the corrugation with the result that even had the modified filters been established by the evidence, they would not anticipate the Farr patent in suit. Moreover, Appellants' evidence as to the manufacture and sale of the so-called "45° filters" was held by the trial court to be insufficient to support a finding that such filters had ever been made or sold [Finding 33, R. 1180]. Appellants attack this finding as being clearly erroneous, relying on the deposition testimony of the witnesses Worth and Flaig, even though the trial court after reading the depositions stated that there was not only a lack of preponderance of evidence of such sales but that it would almost have to make the finding in the negative [R. 1447].

A review of the depositions amply supports this view. Thus, the only evidence was oral testimony based upon events which had occurred approximately 20 years ago. While the witness Worth testified that he had made and sold Kleenaire filters having 45° corrugations, he was unable to even estimate the number when asked [R. 1233]. Moreover, in describing his work with 45° corrugations Worth earlier testified that he merely experimented with the same [R. 1199] and that "As I told you previously, in the original tests of this type of filter I had the angles placed at a forty-five degree angle and I discovered that by changing the angle of corrugations we gained more efficiency and the final result was that the plates were made, corrugated, from one corner of the plate to the other as the cut shows" [R. 1225]. Again, Worth testified, "As I stated previously, I started out with this

type of corrugation—forty-five degree corrugation * * * And I found as I went along with my experiment this was not as efficient as this one, * * *” [R. 1237]. The same witness, by affidavit [Ex. 54-C, R. 1457], stated that he invented the Kleenaire filter and thereafter began their manufacture and sale and that the crimps or corrugations of the filter media were so arranged that one end terminated in the frame. The other deposition produced by Appellants to establish the manufacture and sale of the 45° filter proved even less convincing. Thus, the witness Flaig, who went to work for the Kleenaire Corporation immediately upon graduation from high school [R. 1267] and whose duties were making filters and crating them for shipping, as he was the only one working there at the time [R. 1268], testified that he had no definite recollection as to what the angles of the corrugations were [R. 1297] and that he was given no instructions as to changing the angle of corrugation of the filter unit he was making [R. 1277, 1278], thereby contradicting the testimony of Worth who had stated that he was selling the 45° filters after Flaig came to his employ [R. 1250] (although he also testified [R. 1250] that he put out the 45° filters the first few months that he was in business and before Mr. Flaig came to him).

That this garbled and inconsistent oral testimony based upon events alleged to have transpired some 20 years ago wholly fails to meet the burden of proof of prior use and sale established by the Supreme Court and recognized by this Court is clear. Thus, in the leading case of *Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.* (1891), 143 U. S. 275, 36 L. Ed. 154, in holding the patent valid against the defense of public use where a large number of witnesses had testified as to the use of

a barbed wire fence such as that claimed in the patent, the Court stated, 36 L. Ed. at 158:

“We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory and beyond a reasonable doubt. * * * Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. The doctrine was laid down by this court in *Coffin v. Ogden*, 85 U. S. 18 Wall. 120, 124 (21:821, 823), that ‘the burden of proof rests upon him,’ the defendant, ‘and every reasonable doubt should be resolved against him.’ ”

See also:

Smith v. Hall (1936), 301 U. S. 216, 81 L. Ed. 1049, 1055;

Deering v. Winona Harvester Works (1894), 155 U. S. 286, 39 L. Ed. 153.

The rule has been consistently followed by this Court.

Paraffine Companies v. McEverlast, Inc. (1936), 84 F. 2d 335, 339;

Waterloo Register Co. v. Atherton (1930), 38 F. 2d 75.

In this latter case this Court stated:

“The rule is well settled, of course, that a defense of this kind must be proved with certainty and beyond reasonable doubt; but whether the proof measures up to that requirement, or not, *is ordinarily for the trial court to determine.*” (Emphasis added.)

This Court has very recently, however, reversed a trial court's finding of prior use based upon uncorroborated oral testimony in deposition form, holding in *Stearns v. Tinker & Razor* (1955), 220 F. 2d 49, 55:

“There simply is not here the degree of proof which will sustain a finding of prior public use. *Paraffine Companies, Inc., v. McEverlast, Inc.*, 9 Cir., 84 F. 2d 335, 339; *Rown v. Brake Testing Equipment Corp.*, 9 Cir., 38 F. 2d 220, 223.”

Appellants next contend that even though the evidence is insufficient to establish the sale of 45° filters, Exhibit CCC [R. 1458, 1459] establishes that such filters were offered for sale and illustrated in a printed publication. This fact, however, is utterly immaterial to the question presented. Counsel for Appellee conceded that the device shown in Exhibit CCC was manufactured and sold [R. 1188] but this is not the device on which Appellants' argument is based. As above noted, Appellants seek to establish the 45° filter to show that Kleenaire filters were made having corrugations extending through the filter rather than dead-ending at one end or the other in the frame of the filter. Exhibit CCC illustrates a filter in which the angle of corrugations is approximately 45°, but the change in angle of the corrugations is accompanied by a change in filter dimensions with the result that the corrugations dead-end in the frame in Exhibit CCC just as do the corrugations of Exhibits SSS and TTT. The same situation is true of Defendants' Exhibit HHH [R. 1463]. There,

Figure 1 illustrates a filter wherein the corrugations are approximately 9° and Figure 3 indicates a filter wherein the angle of corrugations is approximately 45° . Again, the dimensions of the filter are changed in each case so that the corrugations dead-end in the frame. These changes in dimensions demonstrate that meticulous care was taken in the various drawings of the Kleenaire filters to insure that the corrugations dead-end in the frame regardless of the size or dimensions of the filter illustrated [R. 1413, 1414].

Accordingly, the trial court's finding that the evidence failed to establish that any Kleenaire filters were ever made and sold which had corrugations not terminating at one end or the other in the filter frame [Finding 33, R. 1180] is fully supported. Since Exhibit CCC does not describe such a filter, Appellants' argument with respect to this exhibit has no bearing on the question.

Appellants' argument on page 18 of their Supplemental Brief with respect to the abandoned application of the patentee of the patent in suit is based upon the assumption that the " 45° Kleenaire" is substantially identical with the forms of the Farr filter shown in Figures 3 and 5 of the abandoned application. The filters shown in these figures, however, contain corrugations which extend completely through the frame rather than dead-ending in the frame as in the case of all proven Kleenaire filters. Appellants' assumption is therefore unsupported and accordingly the argument based thereon of no merit. Moreover, the argument itself is incorrect since Appellants neglect to mention that each of the claims in suit of the patent describes the corrugations which form the passages through the filter as changing in direction, a feature not suggested even in the alleged modifications of the Kleenaire filters which Appellants failed to establish.

8. **The Farr Patent in Suit Is a True Combination of Elements Which Function Together in a New Mode of Operation to Produce New and Surprising Results.**

The final contention made by Appellants in their Supplemental Brief is that the patent in suit is invalid as an unpatentable combination of old elements. This point was urged by Appellants in their Opening Brief (pp. 27-38) and was fully met by Appellee in its original Brief (pp. 57-63). Appellants now urge, however, that the District Court made no finding that the old elements of the patent in suit perform an additional and different function in combination than they perform out of it, and contend that under the recent decision of this Court in *Kwikset Locks v. Hillgren* (1954), 210 F. 2d 483, the patent is accordingly invalid. As will be shown herein, the *Kwikset* case not only fails to support Appellants' contention, but is directly *contra* thereto. Moreover, such a finding was definitely and unequivocally made by the District Court. Thus, the District Court found that the filter of the patent is to a new combination of elements [Finding 29, R. 1179] which has a new mode of operation [Finding 30, R. 1179] and which achieves new and surprising results [Finding 31, R. 1180]. Appellants' statement that the District Court failed to find that the elements in combination performed an additional and different function is wholly unfounded and simply ignores these clear and express findings.

Kwikset Locks v. Hillgren (C. A. 9, 1954), 210 F. 2d 483, relied upon by Appellants, involved two patents. The first patent to Hillgren covered the combination of a reverse rocker type lock and a deadlatch mechanism to prevent tampering with the lock. The trial court

sustained the patent simply on the ground that the patentee was the first to combine these two items, both of which were in the prior art. This Court held that neither the reverse rocker nor the deadlatch mechanism operated any differently in combination than in the prior art and that the combination accomplished no more than the sum of its parts (*i.e.*, no new result). A straightforward case of aggregation was thus presented and, of course, was held to be unpatentable. The second patent in suit, the Kwikset patent, covered a combination door knob consisting of three separate parts. As to this patent, the Court stated:

“Since knobs consisting of these three elements are not new to the art, if the validity of the Kwikset patent is to be sustained, it must be done on the basis of the particular construction of its several parts and the manner in which they are fitted together.”

210 F. 2d at 488.

The Court held the patent valid and the patent in suit is of precisely the same nature. Thus, the evidence establishes that the new and surprising results of the filter of the patent in suit are achieved by the particular construction of its several parts and the manner in which they are fitted together. The sheets of screen mesh are arranged parallel to the general direction of air flow and are corrugated or crimped to provide valleys or passages extending through the entire depth of the filter through which the air can flow as the filter becomes progressively loaded with dust. Moreover, these corrugations are abruptly bent so as to impart turbulence to the air flowing through the passages thereby insuring high efficiency. Further, a large number of these corrugated sheets are employed and, in the language of this Court, are “fitted together” so as

to divide the panel both in the horizontal and vertical dimensions into a multiplicity of the above-described passages and consequently separate the air flowing through the filter into a large number of small filaments to provide high efficiency. Like the second patent in the *Kwikset* case the Farr patent covers a patentable combination.

In the very recent decision of this Court in *Stearns v. Tinker & Rasor* (1955), 220 F. 2d 49, a combination patent covering an insulation testing device known in the art as a "holiday detector" was held valid, the Court reversing a decision of the trial court to the contrary. The Court held, 220 F. 2d at 57:

"The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings. * * * And this different coaction of the elements produces a new and useful result, viz.: The detection of holidays in a more facile and efficient way. (Citing cases.)"

The combination of the patent in suit clearly meets these requirements. Thus, as described in the preceding paragraph, the form and arrangement of the screen sheets and of the corrugations therein function to divide the air passing through the filter into a large number of small filaments, and form passages extending through the filter to permit progressive loading of dust in the filter and, further, abruptly change in direction to impart turbulence to the air flowing through the filter. There can be no question but what the elements of the combination operate differently in the combination than they did in their old surroundings, since, as found by the trial court, the filter of the patent has a new mode of operation [Finding 30, R. 1179]. Moreover, this different coaction of elements produces a new and surprising result [Finding

31, R. 1180]. The combination of the patent in suit therefore meets the requirement established by this Court in the *Stearns* case and amounts to patentable invention.

Conclusion.

Both judgments of the District Court are fully supported by the Findings of Fact. Moreover, the evidence amply supports each of the Findings. Appellants have failed to cast any real doubt upon any of these Findings and most certainly have not shown any of them to be clearly erroneous as required by Rule 52 of the Federal Rules of Civil Procedure. Appellee respectfully submits that the judgments of the District Court should be affirmed.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES D. GRATIOT and AIR-MAZE CORPORATION,

Appellants,

vs.

FARR COMPANY, a corporation,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

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No. 13,352.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES D. GRATIOT and AIR-MAZE CORPORATION,

Appellants,

vs.

FARR COMPANY, a corporation,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

Now comes Farr Company, appellee herein, and petitions the Court for a rehearing in this cause. In its decision reversing the judgment of the lower court holding claims 4, 5, 7 and 8 of Farr patent No. 2,286,479 valid and infringed by appellant, this Court held the patent invalid as lacking the "unusual or surprising consequences" required by *A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147. The stated basis for this decision was simply that the Court did not agree with the finding of the lower court [Finding of Fact 13] relating to the French patent No. 739,956, to Nestle.

The only reference made by the Court in its brief opinion to any of the evidence submitted in the trial of this action is to portions of the French patent and to a physical exhibit YY introduced by appellant. The Court states that this physical exhibit shows that the elements of the filter of the French Nestle patent "give exactly the mechanism to collect the dust as in the Farr device." In this it appears that the Court failed to appreciate the true nature of this exhibit. The filter model YY was con-

structed by the appellants during the trial of this action. As will be shown herein, it does *not* exemplify the filter described in the French Nestle patent and was made contrary to rather than in accordance with the teachings of such patent. Moreover, the Court makes no reference to other fully supported findings of fact which bear directly on the issue of invention of the patent in suit over the French Nestle patent.

It is respectfully submitted that the only possible bases for the decision of this Court were that the Court was misled as to the true nature of physical exhibit YY or, in the alternative, that this Court simply ignored Rule 52(a) of the Federal Rules of Civil Procedure which precludes an appellate court from setting aside findings of fact unless the same be clearly erroneous.

The grounds, therefore, for this petition are:

(1) That Finding of Fact 13, which recites not only the structural differences between the filter of the Farr patent in suit and the French Nestle patent but also that the latter does not operate by the same mode of operation or achieve the advantages of the former, is supported by the overwhelming weight of the evidence, and accordingly cannot be set aside by this Court under the mandate of Rule 52(a) of the Federal Rules of Civil Procedure;

(2) That physical exhibit YY is merely a filter constructed by appellants for the purpose of this suit which filter did not exist in the prior art and was not made in accordance with the French Nestle patent; and

(3) That this Court has disregarded several findings of fact, which are overwhelmingly supported in the record, which findings fully satisfy the legal requirements for patentability as established by the Supreme Court in the *A. & P. Tea Co. v. Supermarket Corp.* case.

I.

Finding of Fact 13 Is in All Respects Supported by the Overwhelming Weight of the Evidence.

As to Finding of Fact 13 [R. 62], this Court merely states, "We do not agree with this finding." The reasons for such disagreement are not set forth. This finding may be conveniently broken down into four parts:

- (a) That the filter of the French Nestle patent is made of expanded sheets set at right angles to the intended flow of air, rather than parallel as in the Farr patent in suit.
- (b) That when made of metal gauze and oiled these expanded sheets present a solid wall.
- (c) That the Nestle filter does not operate by the same mode of operation as the filter of the patent in suit.
- (d) That the Nestle filter does not achieve the advantages of the Farr patent in suit.

An analysis of its opinion indicates that this Court does not appear to disagree with those portions of the finding indicated as (a) and (b) above, since the Court notes that the metal gauze screens of the Nestle filter are placed at right angles to the flow of air and that the patent contemplates the closing of the gauze apertures with oil. As to these factors, however, the Court states that the first is "irrelevant" and that the second does not create "patentable novelty". These conclusions will be discussed later in this petition.

Accordingly, it must be assumed that this Court's disagreement with Finding of Fact 13 is directed to the above noted portions (c) and (d), that is, whether the Nestle filter operates by the same mode of operation as

the Farr filter and whether it achieves the advantages of the Farr filter. These two points will be separately considered.

Difference in Mode of Operation.

The mode of operation of the Farr filter is described in Findings of Fact 4 [R. 59] and 30 [R. 1179] which recite:

“4. At the start of the operation of the air panels of the patent in suit portions of the air flow *through the mesh of the screen members* into the adjoining passages but as the panels become loaded with dust the flow of air becomes more and more confined to flow through the passages.” (Emphasis added.)

“30. * * * the new mode of operation * * * in the filter of the Farr patent in suit * * * the dust accumulates progressively along the walls of the passages formed by the corrugations which extend through the filter and which change in direction, thereby permitting turbulent flow of air through the passages *and through the mesh of the screen* despite increasing dust load.” (Emphasis added.)

That the mode of operation of the Farr filter is as described in these findings does not appear to be in dispute. It is frequently described in the record, no testimony was introduced to refute it, and finally appellants do not attack Finding 4 in their Statement of Points on Appeal [R. 825-834]. Appellants attack Finding 30 only to the extent that they contend that the mode of operation recited is not “new” [R. 1451]. A critical feature of this mode of operation is that the air to be filtered may flow *through* the mesh of the screen members. Thus, as stated in the patent:

“The filtering efficiency of the filter is dependent upon the fact, to a large extent, that the air rather

than flowing in a stream through the passages 7 and 8 is caused, in fact, to flow through the walls of such passages and the screen openings there provided.” (Farr patent, p. 2, col. 2, lines 42 to 46.)

As will be further discussed herein, the essence of the Farr filter is that it achieves the high filtering efficiency of prior art filters such as the Air-Maze Type B [Ex. 5, wherein the air could only flow through the screen interstices since this filter consisted simply of sheets of screen arranged perpendicular to the flow of air] but at the same time achieves a low pressure drop through the filter together with a very slow rise in pressure drop as the dust load accumulates, such as was accomplished by the Detroit paper filter [Ex. C, which was constructed to have passages extending through the filter defined by impervious walls]. These results are accomplished by a filter medium in which the air to be filtered flows through screen interstices but which does not clog up as such interstices themselves become clogged as dust is accumulated on the filter.

As will be more fully discussed in Section II of this petition, a reading of the French Nestle patent demonstrates conclusively that it cannot have the mode of operation of the Farr patent in suit since the walls of the passages extending through the filter are impervious with the result that air cannot flow through them [R. 771]. After hearing the testimony of the expert witnesses for both the parties Judge Hall concluded as to the Nestle patent “that an essential element of that was that there would be a sufficient oil on it to make it a solid wall so that the air would not circulate through the foramans of the screen.” [R. 819] This was conceded by appellants’ expert witness Russell [R. 459]. It is accordingly respect-

fully submitted that a filter constructed in accordance with the French Nestle patent is incapable of performing by the same mode of operation as the patented Farr filter and that this portion of Finding of Fact 13 is conclusively established in the record.

Difference in Advantages Achieved.

The final portion of Finding of Fact 13, with which this Court states its disagreement, is that the filter of the French Nestle patent does not achieve the advantages of the Farr patent in suit. Appellee respectfully submits that not only was this finding of fact overwhelmingly supported by the evidence submitted but, further, that not one scintilla of evidence was introduced by the appellants to the contrary. Indeed, no attempt was made by appellants to establish, either by test results or even opinion evidence, just what results would be achieved by a filter made strictly in accordance with the teachings of the French patent.

As fully explained on pages 10 and 11 of the Supplemental Brief for Appellee, the testimony offered by both parties demonstrated that the true operating characteristics of filters of the type under consideration cannot be determined by mere visual inspection but require tests under carefully controlled test procedures and specially designed equipments. In view of this need, both parties introduced in evidence a number of charts showing test results and consequently the operating characteristics of the filter of the Farr patent in suit, the Air-Maze P5 filter and a number prior art filters [Appellants Exs. HH, MM, VV, XX and ZZ and Appellees's Exs. 11, 13, 29, 30, 31, 54B-1 and 54B-2]. After carefully considering these performance data, the court found that the filter of the Farr patent in suit (and the infringing Air-Maze P5 filter) achieves

“new and surprising results” in that it has “high efficiency in removing dust from the air and also a low pressure drop which did not increase rapidly” [Finding of Fact 31, R. 1180]. A similar finding is made in Finding of Fact 6 [R. 60].

Filters having passages extending therethrough but formed of solid walls were in existence prior to the invention of the patent in suit.* As conceded by appellants’ witness Watterson, such filters have 7 to 10 percent less efficiency than filters manufactured under the Farr patent in suit [R. 330]. In addition, while filters constructed of mesh screen were also in use prior to the time of the invention of the patent in suit,** such filters had high efficiency but had a rapidly rising pressure drop with dust load [R. 146, 956]. The Farr patent in suit for the first time provided a filter which had not only high efficiency but in addition a low pressure drop which did not rise rapidly with dust load. The District Court so found in Findings of Fact 6 and 31 [R. 60, 1180]. These findings were fully established by actual tests as shown, for example, in exhibits HH, VV, 11, 13, 29, 30, 54B-1 and 54B-2.

No attempt whatever was made by the appellants to show that a filter built in accordance with the teachings of the French Niestle patent would accomplish these new results. Indeed, appellants introduced no evidence whatever as to the performance of a filter manufactured according

*The Detroit paper filters, as described, for example, in the prior art patent to Kaiser 2,019,186 [R. 1022]. As noted on page 30 of the Supplemental Brief for Appellee, the Patent Office agreed with the District Court in this action that the Farr patent constitutes invention over the Detroit air filters.

**Air-Maze Type B filters wherein the screens were placed in sheets perpendicular to the air flow.

to the teachings of the Niestle patent. Quite to the contrary, the appellants produced three filters [Exs. DD, LL and YY] which they sought to show represented the Niestle filter. These filters were not in the prior art but were constructed by appellants for the purpose of this suit. In each, wire screen had been employed instead of the non-foraminous materials required by the French patent. Appellants' only attempt to show the performance of a Niestle filter was to produce test results of Exhibits LL and YY filters [Ex. MM and ZZ, R. 1076, 1078]. For each test the oil had been either drained or sucked from the filter to open the screen interstices [R. 521, 704, 705], contrary to the teachings of the Niestle patent. The fact that appellants constructed and introduced test results of Exhibits LL and YY leads to the inescapable inference that appellants must also have constructed and tested one or more filters which followed the teachings of the Niestle patent but that the results obtained were unfavorable. This inference is buttressed by the fact that appellants' expert Watterson conceded that the Detroit air filter had substantially less efficiency than the Farr filter [R. 330], and the Detroit air filter, like the filter of the French Niestle patent, is one having passages extending through the filter but formed of walls of non-foraminous material.

In addition to the above, the record conclusively establishes a further and additional result achieved by the filter of the Farr patent in suit which is not achieved by the Niestle filter. Thus, Finding of Fact 6 recites in part: "* * * the air filter panel of the Farr patent in suit providing the further advantages of low cost of manufacture and low maintenance as well as ease of cleaning." [R. 60] As previously noted, the Niestle patent teaches the use of sheets of material which are placed perpendicular to the

flow of air. These sheets must not only be punched out and then carefully aligned to provide the required passages through the filter but must somehow be secured together so as to maintain this alignment. An examination of Exhibit YY demonstrates that the filter material is made of copper mesh which, of course, is far more expensive than the simple steel or aluminum screen employed in the Farr filter and the infringing Air-Maze filter. Appellants' witness Brown, who constructed Exhibit YY, conceded under questioning by the District Court that the normal aluminum or steel screen wire could not be formed as taught by the Niestle patent and that a special run of wire was required for a suitable material [R. 705]. Moreover, to maintain alignment of the elements, it was necessary to laboriously solder successive elements together at given points to hold the screen layers in position [R. 771]. In view of the greatly increased cost of materials and complexity of manufacture, appellee's expert Duncan testified that it would not be practical to manufacture such a filter [R. 772]. This statement by a thoroughly qualified expert in the field was not challenged by appellants and accordingly stands conceded on the record.

Summarizing the above, the Niestle patent requires that the passages through the filter be formed of solid walls so as to confine the flow of air through such passages. The patent in suit is directly to the contrary, requiring that the walls of the passages through the filter be open so as to permit the flow of air therethrough. This difference results in an entirely different mode of operation between the two filters. Moreover, the Niestle filter does not achieve the advantages of the filter of the patent in suit. While the Niestle filter may have a low pressure drop with low rise in pressure drop as the dust load increases, it

accomplishes this end only by a substantial sacrifice in filtering efficiency; where as the filter of the Farr patent in suit provides not only low pressure drop and small increase in pressure drop with dust load but at the same time provides high efficiency. Finally, while the Farr filter can be simply manufactured with inexpensive materials, the filter of the French Niestle patent requires expensive materials and laborious and costly manufacturing techniques, with the result that it is not a practical filter. Since each of these facts is fully supported by the evidence, appellee respectfully submits that Finding of Fact 13 is in all respects correct.

II.

Physical Exhibit YY Did Not Exist in the Prior Art and Was Not Made in Accordance With the French Niestle Patent.

In its opinion this Court states that Exhibit YY* shows that the angled slot passages surrounded by the screen gauze of the Niestle patent give exactly the same mechanism to collect the dust as the Farr device. If this be the basis for the Court's disagreement with Finding of Fact 13, it is respectfully submitted that the Court has been misled, albeit accidentally, into assuming that such exhibit exemplifies the teachings of the Niestle patent. Such is not the case. Exhibit YY was constructed by appellants' witness Brown during the trial of the action [R. 700] and was made of 16 mesh (16 openings or interstices per linear inch) wire screen [R. 696]. This mesh size corresponds to that employed in the Farr filter and the infringing Air-

*Indicated in the opinion as "KY." It is assumed that this is a typographical error inasmuch as there is no exhibit identified as "KY."

Maze P5 filter [R. 173]. Exhibit ZZ [R. 1086], which shows the performance of filter YY, was obtained by first oiling the filter and thereafter sucking the oil from the filter to open up the screen interstices [R. 706]. Such filter is not only not described in the French Niestle patent but, to the contrary, is diametrically opposed to the teachings of the Niestle patent and accordingly should not be considered by this Court as exemplifying the prior art.

The French Niestle patent, a translation of which appears on pages 1069 to 1074 in the record, describes a filter having air passages through which the air may flow from the entrance to the exit sides of the filter. The patent repeatedly and explicitly describes these as confining passages which compel the flow of air therethrough. Thus, the patent states: "The gas is thus compelled to follow a path between sharply staggered points" [R. 1070]. "* * * the gas is thus forced to circulate along a winding path" [R. 1071]. "* * * elements * * * comprising zig-zag conduits compelling the dust-laden gas to follow a winding path" [R. 702]. And finally, "5. The metal gauze has meshes fine enough for the liquid to fill them by capillary action and form a continuous, thick liquid film, favoring the deposition of the dust suspended in the gas." [R. 1074]. The patent describes several different types of materials which may be employed for the filter material. These are "metal plates," "metal gauze * * * fine enough for the liquid, such as oil, applied thereon to fill the meshes by capillary action and form a continuous, thick film of oil," "metal plate * * * perforated with holes * * * of small diameter, intended to retain the oil, again forming a continuous film over these holes," and finally a "metal plate * * * (having) grooves * * * keeping the film of oil on the surface of the element" [R. 1071-1073].

These repeated and explicit directions in the French patent demonstrate that the very essence of the patent is that the air stream be absolutely confined in the passages extending through the filter, and each of the materials suggested fulfills this requirement. Thus, the described metal plates or the metal plates with grooves necessarily present solid wall surfaces. Where either wire gauze or metal plates perforated with small holes are suggested, the patent is careful to point out that the openings in these materials are to be filled with oil so as to present solid surfaces.

To transform the solid wall passages required by the Niestle filter into foraminous or open passage walls through which the air may pass not only departs from the teachings of the Niestle patent but is diametrically opposed to such teachings. The result, as pointed out in the first section of this petition, is not only a filter having an entirely different mode of operation, but a filter which achieves new and unexpected advantages and results. It is submitted that under the circumstances this Court should place no reliance whatever on appellants' Exhibit YY as regards the validity of the Farr patent in suit.

III.

The Facts Conclusively Established at the Trial of This Action Fully Satisfy the Legal Requirements for Patentability Set Forth in the A. & P. Case.

As noted by this Court in its opinion, the Supreme Court in *A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147, has stated the test of patentability to be "unusual or surprising consequences" resulting from the unification of elements in a new combination. Appellee submits that the results accomplished by the Farr patent in suit completely met this test. A comparison of the filter of the patent in

suit with that described by the French Niestle patent demonstrates that: (1) a new mode of operation is achieved, (2) markedly superior performance is achieved, and (3) a practical and commercially successful, as distinguished from an impractical filter, results.

That the new results achieved are unusual and surprising is clear. Thus, the performance of filters of the type here considered is in large measure unpredictable and can only be ascertained by carefully controlled tests. This is strikingly demonstrated by the testimony of appellants' own expert Russell who, when asked to compare the operating characteristics of the Kleenaire filter (about which he was testifying) with that of the filter of the Farr patent in suit, stated that he could not do so because he had not tested the Kleenaire [R. 1361]. Moreover, as pointed out by the District Court in its memorandum opinion, prior to the invention of the patent in suit, the industry had made an exhaustive study of air filters by Professor Rowley (another of appellants' experts) and was "going to great pains and great lengths and spending a great deal of money and doing it scientifically in order to find what apparently the plaintiff put together here in a combination, a successful and novel and useful invention." [R. 822] Further, the District Court, while expressly noting that commercial success in itself is insufficient to support a patent, noted that the commercial success of the Farr filter indicated strongly that the same amounted to invention [R. 821]. The record discloses that the industry had for years been compelled to select either a filter of high efficiency or, in the alternative, a filter with low pressure drop and low rise in pressure drop with dust load. For the first time, the patentee Farr produced a filter having both these characteristics. The response of the industry to the new filter was little less than remarkable. The patentee

commenced operation with substantially no capital in a small room, assisted only by his two sons. The ever-increasing demand for the Farr filter has resulted in the business expanding until it now occupies a large new manufacturing plant employing some 150 people, and having sales throughout the entire United States and many foreign countries [R. 303].

The District Court found that the Farr filter achieved “new and surprising results * * * high efficiency in removing dust from air and also a low pressure drop which did not increase rapidly * * * with dust load” [Finding of Fact 31, R. 1180]. This Finding is fully supported by the record, and indeed, the appellants introduced no real evidence inconsistent therewith. Accordingly, the test of invention prescribed by the Supreme Court in the *A. & P.* case is fully met.

An additional factor not mentioned by this Court in its opinion is the savings in cost of materials, simplicity of construction, low maintenance and ease of cleaning of the Farr filter over that of the Niestle patent as described in Finding of Fact 6 [R. 60]. The courts have repeatedly recognized that “To obtain simplicity is the highest trait of genius” and have many times sustained patents for inventions which, as here, represented marked simplification over prior devices or accomplished an old result in a more facile, economical and efficient way. See, for example, the recent decision of this Court in *Stearns v. Tinker & Razor* (1955, 220 F. 2d 49. See also *Willard v. Union Tool Co.* (C. A. 9 1918), 253 Fed. 48; *Aronson v. Toy Devices* (C. A. 3 1924), 1 F. 2d 91; *Postage Meter Co. v. Standard Mailing Mach. Co.* (C. A. 1 1925), 9 F. 2d 19; *National Tube Co. v. Aiken* (C. A. 6 1908), 163 Fed. 254; *James Heekin Co. v. Baker* (C. A. 8 1905), 138 Fed. 63.

Conclusion.

Appellee respectfully submits that (1) Finding of Fact 13, with which this Court has expressed its disagreement, is overwhelmingly supported by the evidence and cannot properly be set aside under the mandate of Rule 52(a) of the Federal Rules of Civil Procedure; (2) Physical Exhibit YY on which this Court relied in its opinion does not represent a filter made in accordance with the teachings of the French Nestle patent but to the contrary is diametrically opposed to such teachings and (3) the remarkable properties of the filter of the patent in suit conclusively established by the test data presented to the trial court plus the simplicity and economy of manufacture of the filter fully satisfy the requirements for invention as established by the decisions of this Court and by the Supreme Court in *A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147.

Petitioner therefore respectfully requests it be granted a rehearing on these points.

Dated at Los Angeles, California, this 8th day of November, 1956.

Respectfully submitted,

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Attorneys for Appellee.

Certificate of Counsel.

I, RICHARD E. LYON, of counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

RICHARD E. LYON,
Attorney for Petitioner.

No. 13606

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Rela-
tion of and to the Use of Westinghouse Electric
Supply Company, WM. RADKOVICH COM-
PANY, INC., et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 260, inclusive)

Appeal from the United States District Court for the
Southern District of California, Central Division

FILED

MAY 1 1953



No. 13606

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY,
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Appellant,

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UNITED STATES OF AMERICA, at the Relation of and to the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., et al.,

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* Page numbering appearing at bottom of page of original certified Transcript of Record.



In the District Court of the United States, Southern
District of California, Central Division

No. 9303-Y

UNITED STATES OF AMERICA, at the Relation of and to the Use of Westinghouse Electric Supply Company, a Corporation, Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC., a Corporation, United Pacific Insurance Company, a Corporation, General Casualty Company of America, a Corporation, Excess Insurance Company of America, a Corporation, Manufacturers' Casualty Insurance Company, a Corporation, and E. B. Woolley, Defendants.

COMPLAINT

Upon Bond and Against Contractor for Materials
and Labor Upon Government Contract

I.

Plaintiff avers that Westinghouse Electric Supply Company, a corporation, for whose benefit this suit is brought, is a materialman who furnished and supplied labor and materials to be and which were used by Defendant E. B. Woolley, sub-contractor, acting under Defendant Wm. Radkovich Company, Inc., a corporation, general contractor, for the performance of a certain contract entered into between said last named corporation, as contractor, and the United States of America, dated the 19th day of June, 1947, for the construction of public works within the meaning of the Act of Congress of August 24, 1935, (49 Statutes [2] 793), being the Federal Public

Works Bond Act, commonly known as the "Miller Act".

That Westinghouse Electric Supply Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Delaware, and duly authorized to do business in the State of California, and with an office and place of business therein at Los Angeles, California, and elsewhere.

II.

That the Defendant, United Pacific Insurance Company, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

That the Defendant, General Casualty Company of America, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

That the Defendant, Excess Insurance Company

of America, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein. [3]

That the Defendant, Manufacturers' Casualty Insurance Company, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

That the Defendant, Wm. Radkovich Company, Inc., is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California, with an office and its principal place of business in the County of Los Angeles, State of California; that said corporation was and is authorized to engage in the general construction contracting business.

III.

That pursuant to a printed invitation for bids given by the War Department of the United States

of America, the Defendant, Wm. Radkovich Company, Inc., submitted its bid and was awarded the contract for the performance of all the work required for the construction of Temporary Family Quarters, Job No. Muroc AAF 7-210-2, at Muroc Army Air Field, Muroc, California, in accordance with the specifications for the construction of said work.

That the contract so awarded was made and executed and bears date of June 19, 1947; that by the terms of said building contract, it was provided that the said Defendant, Wm. Radkovich Company, Inc., should erect and construct the improvements above referred to as the prime contractor for the United States of America as owner, at Muroc, California, for an estimated contract price of \$749,999.50, as required by the plans and specifications referred to in said contract. [4]

IV.

That for valuable and adequate considerations, moving severally to the Defendant-Surety Companies next named, the Defendants, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, severally made, executed and delivered, and the said last named companies caused to be filed with the proper government officials a certain Standard Form of Payment Bond (Construction), pursuant to said Act of Congress, approved August 24, 1935 (49 Statutes 793), whereby in the aggre-

gate said four Defendant-Surety Companies bound themselves as Sureties for said Defendant, Wm. Radkovich Company, Inc., a corporation, unto the United States of America in the aggregate penal sum of \$374,999.75, and wherein said bond it is recited that said Sureties, while being bound firmly by said bond jointly and severally, are bound under the terms of the following proviso: "Provided, That we the Sureties bind ourselves in such sum 'jointly and severally' as well as 'severally' only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule", in which schedule the respective limits of liability for the respective four Defendant-Surety Companies is set forth as \$93,749.94, and in which bond, subject to the proviso above set forth, it is agreed that if the principal should faithfully perform its contract and all of its terms, covenants and conditions and should promptly pay to all persons supplying the principal with labor and materials in the prosecution of the work in the contract provided, then the obligation is to be void; otherwise, it shall remain in full force and virtue; that specific reference is hereby made to said bond for its [5] full terms, said bond being attached hereto and marked "Exhibit A".

That said bond is and at all times since the execution and delivery thereof as aforesaid has been in full force and effect; that the said Defendant,

Wm. Radkovich Company, Inc., joined in the execution of said bond as principal and in the penal sum of \$374,999.75, as more particularly set forth in the copy of said bond attached hereto.

V.

That thereafter the said Wm. Radkovich Company, Inc., entered upon the performance of its contract and thereafter completed said contract, and in the performance of said work employed the Defendant, E. B. Woolley, as a sub-contractor, to perform a certain portion of the work embraced within the general contract or prime contract hereinbefore referred to, the exact amount of work embraced in said contract being to this Plaintiff unknown, but including within its scope the furnishing and installation of all electrical installations on said job as the electrical sub-contractor, and Plaintiff is informed and believes and upon such information and belief alleges that said electrical subcontract by its terms provided for a payment to said Defendant, E. B. Woolley, of the aggregate sum of \$80,000.00.

That Plaintiff is informed and believes and upon such information and belief alleges that said prime contract and the performance of the work required thereunder has been completed, but that no final settlement thereof has been made by the United States of America, through its properly constituted officers.

VI.

That the War Department of the United States of America was duly authorized and empowered by

law to undertake the construction of said buildings and improvements, and that the same were undertaken and built upon land owned by the United States of [6] America at Muroc, California.

VII.

That from time to time during the progress of the construction of the work of improvement referred to in this Complaint, and between on or about the 19th day of August, 1947, and on or about the 31st day of March, 1948, the said Westinghouse Electric Supply Company, a corporation, at the special instance and request of the Defendant, E. B. Woolley, and upon the promise of the said Defendant, E. B. Woolley, to pay the prices quoted by Plaintiff therefor to said Defendant, which prices at all times were likewise the reasonable value thereof, sold and delivered certain electrical equipment, supplies and materials for use in, and which were used in said work of improvement, and which were of the total agreed price and reasonable value of \$52,622.13; that thereafter, there was paid on account of said materials so sold and delivered, in cash, the sum of \$9,108.08, and no more, leaving a balance due, owing and unpaid on account thereof in the sum of \$43,514.05; that the following is a tabulation of the materials furnished, the shipping date of the order therefor given by the said Defendant, E. B. Woolley, and the amount agreed to be paid therefor by said Defendant, E. B. Woolley, and charged for the same respectively:

Shipping Date	Item	Amount
August 19, 1947—	20,000 ft. of 1/2" steel tube.....	\$ 1,200.43
August 19, 1947—	1,000 ft. of 1 1/2" galvanized conduit....	281.98
August 25, 1947—	2 only No. K-80009 Panel Cans; 1 only No. 14197 Appleton steel tube bender; 1 only No. 4196 Thomas & Betts bender; 1 only H. U. 20 Black & Decker grill	57.21
August 28, 1947—	1500 ft. 3/4" steel tube.....	129.90
August 29, 1947—	1 only L.R. Can and 5 only W. Cans....	14.76
September 12, 1947—	3500 ft. 3/4" steel tube.....	308.45
September 15, 1947—	100 only No. 72171 galvanized boxes; 100 only 72-C-3 plaster rings; 500 only No. 54-C-3 galvanized box covers; 100 only 54-C-1 gal- vanized box covers; 300 only 52151 special galvan- ized boxes; 1800 No. 52151 1/2" galvanized boxes; 1500 No. 52-C-13 plaster rings; 100 No. 52-C-17 plaster rings; 100 No. 3865 Thomas & Betts ground bushings; 100 only No. 1 Perry ground clamps; 300 only 4 D thru boxes; 1700 only No. 5221 Thomas & Betts 3/4" connectors; 1700 only No. 5220 Thomas & Betts coup- plings; 4900 only No. 5120 Thomas & Betts connectors; 1800 only No. 5120 Thomas & Betts couplings; 400 only No. 5321 Thomas & Betts connectors; 400 only No. 5320 Thomas & Betts couplings.....	2,320.73
September 17, 1947—	300 ft. 1" steel tube.....	34.47
September 24, 1947—	125 only No. 54571 1/2" concrete boxes	71.88
September 25, 1947—	6 only No. 3846 Bryant range re- ceptacles	14.98
September 25, 1947—	99 only L. R. Cans and 200 only W. Cans	735.54
September 29, 1947—	295 W. Cans	725.70
September 29, 1947—	6000 ft. 1/2" steel tube.....	350.55
October 6, 1947—	56 only No. 3851 Thomas & Betts ground bushings	10.91
October 16, 1947—	400 ft. 1" steel tube.....	48.66
October 20, 1947—	1000 ft. No. 6-3 type S. wire; 1000 ft. 12-3 type S. wire; 1 only No. D.F. 322 I Switch; 1 only No. D.F. 323 Switch; 6 only No. Non-60 Fuses; 6 only Non-100 Fuses; 1 only 42" general cable reel	720.68
October 31, 1947—	2550 ft. No. 8 type T.W. Rome Wire; 18,610 ft. No. 10 T.W. general cable wire; 24,000 ft. No. 12 T.W. Rome wire	872.18

Shipping Date	Item	Amount
November 7, 1947—	268 only No 52-C-48 plaster rings.....	30.53
November 11, 1947—	1500 ft. ¾" steel tube.....	132.55
November 13, 1947—	5 only No. 3846 Bryant range recep- tacles	11.27
November 13, 1947—	5000 ft. ¾" steel tube.....	441.84
November 14, 1947—	100 only No. 72-C-18 plaster rings....	37.90
November 18, 1947—	300 ft. 2" Sheridized conduit.....	116.70
November 20, 1947—	2300 ft. ¾" steel tube.....	200.38
December 3, 1947—	2000 ft. 1" steel tube.....	244.98
December 22, 1947—	44 only No. 3861 Thomas & Betts ground bushings	8.72
December 10, 1947—	200 ft. 1" steel tube.....	23.41
December 18, 1947—	200 ft. 2" Sheridized Conduit.....	83.52
December 22, 1947—	1000 ft. No. 4 Wire.....	85.36
January 13, 1948—	132 - 52-C-48 Plaster rings.....	15.22
January 20, 1948—	1000 ft. 1" steel tube.....	114.90
January 26, 1948, February 26, 1948, March 4, 1948, March 9, 1948, March 16, 1948—	Extensions 1-2-3-4-5 Wire	1,906.02
January 28, 1948—	100 special type N.A.B. 3-L Panels (Individual house switchboards)	18,798.50
February 13, 1948—	175 - 54571 Concrete Boxes.....	109.89
February 13, 1948—	1500 ft. 1-O Type R. H. black Wire....	319.06
February 27, 1948—	100 L. R. 161 Heaters; 100 W-202 M.U. Thermador Air Heaters; 200 W-302 M.U. Thermador Air Heaters; 200 W-402 M.U. Thermador Air Heaters	21,999.58
March 23, 1948—	5 W. Cans	13.12
March 31, 1948—	40 Bryant receptacles	99.41
	Total.....	\$52,691.87
October 17, 1947—	Credit Memorandum, Invoice No. J-27329	\$39.12
March 31, 1948 —	Credit Memorandum, Invoice No. S-55082	\$30.53
	Total Credits	\$ 69.65
	Total Account	\$52,622.22
	Less: Paid on account.....	\$ 9,108.09
	Balance Due	\$43,514.05

That by the terms of sale of said merchandise, it was provided that the Defendant, E. B. Woolley, would pay the purchase price thereof as follows: For all deliveries during any given calendar month, the full price thereof on the 10th of the month next succeeding the month of delivery; that the last delivery was made on the 31st day of March, 1948, and that the last of said materials by the terms of such sale were to be paid for by said Defendant, E. B. Woolley, on or before the 10th day of April, 1948; that the whole of said balance of \$43,514.05 became due and owing on the said 10th day of April, 1948; and that there is now unpaid said balance of \$43,514.05 with interest thereon, at the rate of seven percent (7%) per annum from and after the 10th day of April.

VIII.

That said materials and supplies so furnished were actually used by the said Defendant, E. B. Woolley, electrical sub-contractor, in the performance of his said sub-contract with the Defendant, Wm. Radkovich Company, Inc., and in the work required to be done by the said prime contractor under the specifications and in the performance of the work embraced within the said prime contract aforementioned, and that the said materials actually went into said work and the structures erected.

That since the delivery of said materials by Plaintiff it has made demand upon the said Defendant, E. B. Woolley, sub-contractor, the Defendant, Wm. Radkovich Company, Inc., [11] prime contractor, as principal on said payment bond, and

upon each and every of the said Defendant-Sureties of said prime contractor, for the payment of the amount due to it for said materials so furnished, but said Defendants, and each of them, have failed, neglected and refused and still do fail, neglect and refuse to pay said sum, or any part thereof.

1

IX.

That inasmuch as the said Plaintiff had no direct contractual relationship with said prime contractor furnishing said payment bond, but had direct contractual relationship with said sub-contractor, as aforesaid, the Plaintiff, Westinghouse Electric Supply Company, did, on or about the 10th day of April, 1948, deposit in the United States mail, postage prepaid and registered, in an envelope addressed to the prime contractor, the Defendant, Wm. Radkovich Company, Inc., at a place of business maintained by said Defendant last named, and at which place the said Defendant did then and there maintain an office, to-wit, at 4920 East Washington Boulevard, Los Angeles, California, a Notice, in writing, stating with substantial accuracy the amount claimed by said Plaintiff, Westinghouse Electric Supply Company, to-wit, \$43,514.05, and the name of the party to whom said materials were furnished, to-wit, the said Defendant, E. B. Woolley, and said Plaintiff, Westinghouse Electric Supply Company, is informed and believes and upon such information and belief alleges that said Notice was actually received by the said Defendant, the Wm. Radkovich Company, Inc., on the 11th day

of April, 1948; that a true and correct copy of said Notice to said prime contractor is in words and figures as set forth in Exhibit B, attached hereto and made a part hereof.

That said Notice was so mailed to said prime contractor, as aforesaid, within ninety (90) days from the date on which the said Plaintiff, Westinghouse Electric Supply Company, furnished [12] the last of the materials to be supplied by it; that the last of the materials supplied by it on said job was supplied on the 31st day of March, 1948.

X.

That said balance of \$43,514.05 due, owing and unpaid to this Plaintiff, as aforesaid, has not been paid, and has not been paid before the expiration of a period of ninety (90) days after the date upon which the last of said materials were furnished by said Plaintiff, Westinghouse Electric Supply Company, and that more than ninety (90) days from the date of furnishing of said last materials has now elapsed, and that this action is being filed before the expiration of one (1) year after the date of final settlement of such contract, final settlement thereof not having as yet been made.

For a Further, Separate and Second Cause of Action, Plaintiff Alleges:

I.

Plaintiff incorporates herein by reference the allegations contained in Paragraphs I, II, III, IV,

V, VI, VIII, IX and X of its First Cause of Action with the same force and effect as though the same were set out in full at this point.

II.

That between on or about the 19th day of August, 1947, and on or about the 31st day of March, 1948, at the special instance and request of the Defendant, E. B. Woolley, and upon his promise to pay the reasonable value thereof, the said Plaintiff, Westinghouse Electric Supply Company, sold and delivered to said Defendant, E. B. Woolley, and furnished for use in said work of improvement above referred to said electrical materials and supplies required in the performance of said work, and in the completion of the sub-contract of the said Defendant, E. B. Woolley, [13] and embraced within the general contract of the said Defendant, Wm. Radkovich Company, Inc., and which materials were of the reasonable value of \$52,622.13; that all of the said materials were used in the performance of said work of improvement and in connection with the performance of said prime contract and were consumed therein; that no part of the purchase price thereof has been paid, except the sum of \$9,108.08; and that there is due, owing and unpaid on account thereof the net balance of \$43,514.05, after deducting all just credits and offsets.

Wherefore, the United States at the relation of and to the use of said Westinghouse Electric Supply

Company, a corporation, Plaintiff herein, prays judgment against the Defendants as follows:

(1) Against the Defendants, E. B. Woolley, and the Wm. Radkovich Company, Inc., and each of them, for the sum of \$43,514.05, plus interest thereon from the 10th day of April, 1948, at the rate of seven percent (7%) per annum until paid;

(2) Against the Defendants, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, and each of them, jointly and severally, in a like sum as is prayed against their principal, the Wm. Radkovich Company, Inc.;

(3) For Plaintiff's costs of suit in this action expended; and

(4) For such other and further relief as to the court may seem meet and proper and consistent with equity.

/s/ GLEN BEHYMER,

Attorney for Plaintiff. [14]

State of California,
County of Los Angeles—ss.

W. F. Gebhard, being by me first duly sworn, deposes and says: that he is the Attorney-in-Fact of Westinghouse Electric Supply Company, a corporation, Plaintiff, in the above entitled action; that he has read the foregoing Complaint Upon Bond and Against Contractor for Materials and Labor Upon

Government Contract and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ W. F. GEBHARD

Subscribed and sworn to before me this 24th day of February, 1949.

[Seal] /s/ MURIEL J. RINGROSE,
Notary Public in and for the County of Los Angeles, State of California. My commission expires July 1, 1951. [15]

[Endorsed]: Filed Feb. 25, 1949.

In the District Court for the United States, Southern District of California, Central Division

No. 9303-Y

UNITED STATES OF AMERICA, et al.,
Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC., a corporation, et al.,
Defendants.

WM. RADKOVICH COMPANY, INC., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation,
Cross-Claimants,

vs.

E. B. WOOLLEY and GLENS FALLS INDEMNITY COMPANY, a corporation,
Cross-Defendants.

CROSS-CLAIM

[31]

Cross-claimants aver:

I.

That the cross-claimant Wm. Radkovich Company, Inc., is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California, with an office and its principal place of business in the County of Los Angeles, State of California; and at all times herein mentioned was and now is a duly licensed contractor in the State of California.

II.

That cross-claimant United Pacific Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

III.

That cross-claimant General Casualty Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

IV.

That cross-claimant Excess Insurance Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such

surety bonds in said State and to do business therein. [32]

V.

That cross-claimant Manufacturers' Casualty Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

VI.

That cross-defendant Glens Falls Indemnity Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

VII.

That pursuant to a printed invitation for bids given by the War Department of the United States of America, the cross-claimant Wm. Radkovich Company, Inc., submitted its bid and was awarded the contract for the performance of all the work required for the construction of Temporary Family Quarters, Job No. Muroc AAF 7-210-2, at Muroc

Army Air Field, Muroc, California, in accordance with the plans and specifications for the construction of said work.

That the contract so awarded was made and executed and bears date of June 19, 1947; that by the terms of said building contract, it was provided that the said defendant Wm. Radkovich Company, Inc., should erect and construct the improvements above referred to as the prime contractor for the United States of America as owner, at Muroc, California, for an estimated contract price of \$749,999.50, as required by the plans and specifications referred to in said contract. [33]

VIII.

That for valuable and adequate considerations, moving severally to the cross-claimants-Surety Companies next named, the United Pacific Insurance Company, a Corporation, General Casualty Company of America, a Corporation, Excess Insurance Company of America, a Corporation, and Manufacturers' Casualty Insurance Company, a Corporation, severally made, executed and delivered, and the said companies caused to be filed with the proper government officials a certain Standard Form of Payment Bond, pursuant to said Act of Congress approved August 24, 1935, (49 Statutes 793), whereby in the aggregate said four cross-claimants-Surety Companies bound themselves as sureties for said cross-claimant Wm. Radkovich Company, Inc., a corporation, unto the United States of America in the aggregate penal sum of \$374,999.75, and

wherein in said bond it is recited that said sureties, while being bound firmly by said bond jointly and severally, are bound under the terms of the following proviso:

“Provided, That we the Sureties bind ourselves in such sum ‘jointly and severally’ as well as ‘severally’ only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule”, in which schedule the respective limits of liability for said respective four defendant-Surety Companies is set forth as \$93,749.94, and in which bond, subject to the proviso above set forth, it is agreed that if the principal should faithfully perform its contract and all of its terms, covenants and conditions and should promptly pay to all persons supplying the principal with labor and materials in the prosecution of the work in the contract provided, then the obligation is to be void; otherwise, it shall remain in full force and virtue.”

That said bond is and at all times since the execution and delivery thereof as aforesaid, has been in full force and effect; that the cross-claimant Wm. Radkovich Company, Inc., joined in the execution of said bond as principal. [34]

IX.

That thereafter the said cross-claimant Wm. Radkovich Company, Inc., entered upon the perform-

ance of its contract and thereafter completed said contract, and in the performance of said work employed the cross-defendant E. B. Woolley as a subcontractor to perform a certain portion of the work embraced within the general contract or prime contract hereinbefore referred to; that said subcontract included within its scope the furnishing of all labor and material, tools, machinery, equipment, facilities, supplies and services, and to do all of the things more specifically set forth and described therein, all in accordance in all respect with the certain specifications attached thereto, and including within its scope the furnishing and installation of and payment for all electrical installations on said job as the electrical subcontractor for an agreed cost of \$80,000.00, subsequently modified in writing by agreement between said cross-claimant Wm. Radkovich Company, Inc., and said E. B. Woolley to the sum of \$73,900.00.

X.

That for a valuable and adequate consideration moving to cross-defendant Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and caused to be filed with cross-claimant Wm. Radkovich Company, Inc., a certain payment bond whereby said Glens Falls Indemnity Company bound itself, as surety for said cross-defendant E. B. Woolley, unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of \$40,000.00, and in which bond it is agreed that if the principal shall indemnify and hold the said obligee free and

harmless from and against all loss and damage by reason of its failure to promptly pay all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

That for a valuable and adequate consideration moving to cross-defendant Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and caused to be filed [35] with cross-claimant Wm. Radkovich Company, Inc., a certain performance bond whereby said Glens Falls Indemnity Company bound itself as surety for said cross-defendant E. B. Woolley unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of \$40,000.00, the condition of said bond being that if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the [Deleted by order of Oct. 31, 1950, signed JMS.]

with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

XI.

That thereafter, the said E. B. Woolley entered upon the performance of his contract and in the performance of said work furnished and [36] installed certain electrical installations as electrical subcontractor.

That claim is now made against these cross-claimants by Westinghouse Electric Supply Company, a corporation, that said Westinghouse Electric Supply Company, at the special instance and request of said cross-defendant E. B. Woolley, and upon his promise to pay the reasonable value, sold and delivered certain electrical equipment, supplies and materials for use in and which were used in said work or improvement, and which were, it is averred, of the total agreed price and reasonable value of \$52,622.13, upon which there has been paid in cash the sum of \$9,108.08, leaving a balance due, owing and unpaid on account thereof in the sum of \$43,514.05 to recover which sum the instant action has now been brought by Westinghouse Electric Supply Company against these cross-claimants as defendants.

Said cross-claimants aver that there is due, owing and unpaid from cross-claimant Wm. Radkovich Company, Inc., to E. B. Woolley on account of the performance of said electrical subcontract a balance of \$16,562.54 and no more.

Wherefore, cross-claimants pray that if judgment is entered herein against these cross-claimants as defendants in favor of plaintiff, Westinghouse Elec-

tric Supply Company, that it be adjudged that the balance due said cross-defendant from said Wm. Radkovich Company, Inc., is the sum of \$16,562.54, and that cross-claimants may have judgment over against cross-defendants for any amount in excess of said sum found to be due said plaintiff, for cross-claimants' costs of suit in this action expended, and for such other and further relief as to the Court may seem meet and proper and consistent with equity.

ANDERSON, McPHARLIN &
CONNERS,

/s/ By ELDON V. McPHARLIN,

Attorneys for Defendants and

Cross-Claimants [38]

Affidavit of Service by Mail attached. [39]

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS UNITED
PACIFIC INSURANCE COMPANY, et al.

Come now United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers Casualty Insurance Company, a corporation, defendants in the action above entitled, and answering for themselves alone and not for their co-defendants, admit, deny and allege as follows:

I.

Answering paragraph I of the complaint these defendants are without knowledge or information sufficient to form a belief as to the truth of the averment therein that the plaintiff furnished and supplied labor and materials to be and which were used by defendant E. B. Woolley, subcontractor, acting under defendant Wm. Radkovich Company, Inc., a corporation, as averred therein. [42]

II.

Admit the allegations contained in paragraphs II, III and IV of the complaint.

III.

Admit the allegations in paragraph numbered V, except that these defendants allege on information and belief that said electrical subcontract referred to therein, by its terms, provided for a payment to said defendant E. B. Woolley of the aggregate sum of \$73,900.00 instead of the aggregate sum of \$80,000.00 as averred in said paragraph.

IV.

Admit the allegations in paragraph numbered VI.

V.

That these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered VII.

VI.

That these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered VIII, except that they admit that a demand was made upon these answering defendants for the amount claimed by said plaintiff and that said claim has not been paid by them, or any of them.

VII.

Admit the allegations in paragraph numbered IX, except that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that the material referred to in said notice was in fact supplied on said job.

VIII.

That these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered X.

Answering the Further, Separate and Second Cause of [43] Action:

I.

These defendants incorporate by reference their answers to paragraphs I, II, III, IV, V, VI, VIII, IX and X of the first cause with the same force and effect as though the same were set out in full.

II.

That these defendants are without knowledge or

information sufficient to form a belief as to the truth of the averments in paragraph numbered II of the said second cause of action.

Wherefore, defendants pray that the plaintiff take nothing by reason of their said action and that said defendants be hence dismissed with their costs.

ANDERSON, McPHARLIN &
CONNERS,

/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants [44]

Affidavit of Service by Mail attached. [45]

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT WM. RADKOVICH COMPANY, INC., a Corporation

Comes now Wm. Radkovich Company, Inc., a corporation, one of the defendants in the action above entitled, and answering for itself alone and not for its co-defendants, admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this defendant is without knowledge or information sufficient to form a belief as to the truth of the averment therein that the plaintiff furnished and supplied labor and materials to be and which were used by defendant E. B. Woolley, subcontractor, acting

under defendant Wm. Radkovich Company, Inc., a corporation, as averred therein.

II.

Admits the allegations in paragraphs numbered II, III and IV.

III.

Admits the allegations in paragraph numbered V, except that this [46] defendant alleges that said electrical subcontract referred to therein, by its terms, provided for the payment to said defendant E. B. Woolley of the aggregate sum of \$73,900.00 instead of the aggregate sum of \$80,000.00 as averred in said paragraph.

IV.

Admits the allegations in paragraph numbered VI.

V.

That this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered VII.

VI.

That this defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph numbered VIII, except that it admits that a demand was made upon this answering defendant for the amount claimed by said plaintiff and that said claim has not been paid by it.

VII.

Admits the allegations in paragraph numbered IX, except that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that the material referred to in said notice was in fact supplied on said job.

VIII.

That this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered X, except that this defendant admits that this action is filed before the expiration of one year after the date of final settlement of such contract and that final settlement thereof has not yet been made.

Answering the Further, Separate and Second Cause of Action:

I.

This defendant incorporates herein by reference its answer to paragraphs numbered I, II, III, IV, V, VI, VIII, IX and X of the first cause of action with the same force and effect as though the same were set out in full. [47]

II.

That this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered II.

Wherefore, defendant prays that the plaintiff

take nothing by reason of their said action and that it be hence dismissed with his costs.

ANDERSON, McPHARLIN &
CONNERS,

/s/ By ELDON V. McPHARLIN,
Attorneys for Defendant Wm. Rad-
kovich Company, Inc., a Corp.

Affidavit of Service by Mail attached. [49]

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT OF DEFENDANT,
E. B. WOOLLEY

E. B. Woolley answers plaintiff's complaint herein as follows:

I.

This answering defendant admits the allegations contained in Paragraphs I, II, III and IV of said complaint.

II.

Answering Paragraph V of said complaint, this answering defendant admits that Wm. Radkovich Company, Inc., entered upon the performance of its general contract therein mentioned and [50] thereafter completed said contract and in the performance of said work, made and entered into a contract with this defendant, dated July 30, 1947, called a sub-contract, wherein and whereby it was provided that this defendant should perform a cer-

tain portion of the work embraced within the general contract or prime contract thereinbefore in said complaint referred to, for a payment to this defendant of \$80,000.00, but denies that the amount of work embraced in said sub-contract included within its scope the furnishing and/or installation of all electrical installations on said job and, in this connection, alleges that the scope of the work embraced in said sub-contract did not include the furnishing or installation of electrical fixtures, chime circuits, phone circuits or added closet lights on said job or any other supplies, equipment, installations or work except the supplies, equipment, installations and work set forth in said sub-contract.

III.

Answering Paragraphs VI and VII, this defendant admits each and every allegation therein contained.

IV.

Answering Paragraph VIII of said complaint, this defendant denies that all the said materials or supplies so furnished, as therein alleged, were actually or otherwise used by this defendant in the performance of his said sub-contract with defendant Wm. Radkovich Company, Inc., and in this connection alleges that a portion thereof was used by this defendant for extra work or additions to said sub-contract furnished at the specific request of said defendant Wm. Radkovich Company, Inc., and that it is true that all of said materials and supplies actually went into said work and in the structures

erected; further answering said paragraph this defendant alleges that he has no information or belief upon the subject matter of certain allegations therein contained sufficient to enable him to make answer thereto and [51] basing his denial upon that ground denies that all said materials or supplies therein mentioned were actually or otherwise used in the work required to be done by the said prime contractor under the specifications or in the performance of the work embraced within the said prime contract therein referred to and in this connection, this defendant is informed and believes and therefore alleges that a portion thereof was used for extra work or additions to said prime contract.

V.

Answering Paragraphs IX and X this defendant admits each and every allegation therein contained.

Answering Plaintiff's Further, Separate and Second Cause of Action, This Answering Defendant Admits, Denies and Alleges:

I.

Answering Paragraph I thereof, this answering defendant incorporates herein by reference, with the same force and effect as though set forth at length herein, Paragraphs I, II, III, IV and V of his answer to plaintiff's first cause of action.

II.

Answering Paragraph II thereof, this defendant

denies that all said electrical materials or supplies therein mentioned were required or used in the completion of the sub-contract of this defendant and, in this connection, alleges that a portion thereof was used by this defendant for extra work or additions to said sub-contract furnished at the specific request of defendant Wm. Radkovich Company, Inc.; further answering said paragraph this defendant alleges that he has no information or belief upon the subject matter of certain allegations therein contained sufficient to enable him to make answer thereto and basing his denial upon that ground denies that all said electrical materials or [52] supplies therein mentioned were required or consumed or used in connection with the performance of or embraced within the general or prime contract of defendant Wm. Radkovich Company, Inc., and in this connection this defendant is informed and believes and therefore alleges that a portion thereof was used for extra work or additions to said prime contract.

Wherefore, this answering defendant prays that plaintiff take judgment as prayed for in its complaint.

/s/ FRANK M. BENEDICT,

Attorney for Defendant, E. B.

Woolley

[53]

Affidavit of Service by Mail attached.

[54]

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT GLENS
FALLS INDEMNITY COMPANY, A COR-
PORATION, TO CROSS-CLAIM

Comes Now Glens Falls Indemnity Company, a corporation, sued in the above entitled action as Cross-Defendant, and, answering for itself alone and not for its co-cross-defendant, admits, denies and alleges:

I.

Answering the allegations contained in paragraph IX, this defendant admits that a subcontract agreement was entered into between [55] the general contractor, Wm. Radkovich Company, Inc., by and through its President, Wm. Radkovich, and E. B. Woolley, as subcontractor, on or about the 30th day of July, 1947, but denies that said subcontract contained any provisions or conditions, as alleged in paragraph IX, or otherwise, except the terms and conditions specifically set forth in said subcontract, a copy of which is attached hereto marked Exhibit "A", and denies generally and specifically each and every other allegation in paragraph IX contained.

II.

Answering paragraph X of said Cross-Claim, this defendant admits that on or about the 6th day of August, 1947, it executed and delivered a Payment Bond and a Performance Bond, wherein E. B. Woolley was named as Principal, this defendant was named as Surety, and Wm. Radkovich Com-

pany, Inc., was named as Obligee, and that the penal sum of each bond was \$40,000.00, but defendant denies generally and specifically that said bonds contained any terms or conditions, as alleged in paragraph X or otherwise, except such terms and conditions as are specifically set out in said bonds, copies of which are attached hereto as Exhibit "B" and made a part hereof by this reference.

III.

Answering the allegations contained in paragraph XI, this defendant admits that subcontractors E. B. Woolley entered upon the performance of said sub-XI, this defendant admits that subcontractor E. B. Woolley \$16,562.54 under said subcontract, and that claim has been made against cross-claimants for certain electrical equipment, supplies and materials which said Westinghouse Electric Supply Company has alleged that it sold to said E. B. Woolley for use in the performance of his said subcontract, a copy of which is attached hereto as Exhibit "A".

This defendant has no information or belief sufficient to enable it to answer any of the other allegations contained in paragraph XI, and, placing its denial on that ground, denies that there [56] is due or owing from E. B. Woolley to Westinghouse Electric Supply Company \$43,514.05, or any other sum, and denies that \$16,562.54 is the balance due said E. B. Woolley by Wm. Radkovich Company, Inc.

This defendant is informed and believes and on that ground alleges that there is due and owing

and unpaid from Wm. Radkovich Company, Inc. to E. B. Woolley under the terms of said subcontract large sums of money, the exact amount of which this defendant does not know but will ask leave of the Court to insert the correct amount when it has been determined.

For a Further, Second and Separate Defense,
This Defendant Alleges:

I.

That it is informed and believes, and, upon such information and belief alleges, that said subcontract was materially altered by the cross-claimant Wm. Radkovich Company, Inc., as contractor, and E. B. Woolley, as subcontractor, without the knowledge or consent of this defendant in that, among other things, payments were made by the cross-claimant Wm. Radkovich Company, Inc. to or for the use of subcontractor, E. B. Woolley, prior to the time that said payments became due under the terms of said contract.

Third Affirmative Defense

I.

That said building contract was altered to permit cross-complainant Wm. Radkovich Company, Inc. to take over control of said subcontract, and cross-claimant Wm. Radkovich Company, Inc. did take over control of said subcontract and did supervise and direct the purchase of materials and did take over and control and supervise said subcontract work.

That cross-claimant Wm. Radkovich Company, Inc., by so taking possession and control of said subcontract work, elected to and did [58] wholly waive any right to recover on said subcontract bond, a copy of which is attached hereto as Exhibit "B".

Fourth Affirmative Defense

I.

That this defendant is informed and believes, and upon such information and belief alleges, that between the 1st day of September, 1947 and the 31st day of December, 1948, cross-claimant Wm. Radkovich Company, Inc. prematurely paid or caused to be paid to or for the account of said subcontractor, E. B. Woolley, on account of said subcontract work, large sums of money in excess of monies then due the subcontractor on account of subcontract work.

Fifth Affirmative Defense

I.

That defendant is informed and believes and upon such information and belief alleges that said subcontract was altered by cross-claimant Wm. Radkovich Company, Inc. and subcontractor E. B. Woolley, so that the said subcontract was not performed or constructed according to the plans or the specifications referred to in said subcontract, a copy of which is attached hereto as Exhibit "A".

That the alterations of said subcontract, plans and specifications by the cross-claimant Wm. Radkovich Company, Inc., as general contractor, and E. B.

Woolley, as subcontractor, were made without the knowledge or consent of this defendant. [59]

Sixth Affirmative Defense

I.

That the Cross-Claim herein fails to state a claim against this defendant upon which relief can be granted.

Seventh Affirmative Defense

I.

That this defendant is informed and believes, and, upon such information and belief alleges, that cross-claimants ordered subcontractor E. B. Woolley to furnish extra and additional materials and to perform extra and additional work not called for by the subcontract or the plans or specifications referred to therein amounting to large sums of money for which cross-claimant Wm. Radkovich Company, Inc. refused to pay.

Wherefore, this defendant prays that the cross-claimants take nothing by their Cross-Claim; that this defendant be awarded judgment for its costs herein incurred, and for such other and further relief as may appear proper.

JOHN E. McCALL and
HAROLD J. DECKER,

/s/ By J. HAROLD DECKER,
Attorneys for Cross-Defendant Glens Falls In-
demnity Company, a Corporation [60]

State of California,
County of Los Angeles—ss.

John E. McCall, being first duly sworn, says: That he is an Attorney at Law admitted to practice before all courts of the State of California, and has his office in the City of Los Angeles, County of Los Angeles, State of California, and is the attorney for the defendant, Glens Falls Indemnity Company, a corporation, in the above entitled action; that said defendant is unable to make this verification because it has no officer within Los Angeles County, and for that reason affiant makes this verification on defendant's behalf; that he has read the foregoing Answer of Cross-Defendant Glens Falls Indemnity Company, a Corporation, to Cross-Claim, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ JOHN E. McCALL

Subscribed and sworn to before me this 26th day of August, 1949.

[Seal] /s/ WALTER L. MANN,
Notary Public in and for the County of Los Angeles, State of California. [61]

EXHIBIT "A"

Sub-Contract Re War Department Construction
Contract No. W-04-353-eng-2050

The within agreement made at Los Angeles, California this 30th day of July 1947 by and between Wm. Radkovich Company, Inc., a California corporation, of Los Angeles, California, (hereinafter called the contractor), and E. B. Woolley (an individual operating under the firm name of E. B. Woolley) with its principal office at Garvey, California (hereinafter called the sub-contractor:

Whereas, the contractor and the United States of America per the War Department, made and entered into, on the 19th day of June, 1947 a certain contract entitled "Construction Contract, War Department, Contract No. W-04-353-eng-2050 (hereinafter called the principal contract; and

Whereas, said principal contract requires the contractor to perform certain services and furnish certain labor and materials, tools, equipment, machinery, and supplies, as more particularly set forth therein; and

Whereas, the sub-contractor has read and fully is familiar with the terms, provisions and conditions of said principal contract, and understands the respective rights, powers, benefits, duties and liabilities of the contractor and of all sub-contractors and of the United States of America thereunder; and

Whereas, the parties hereto respectively desire that the sub-contractor shall, on behalf of the contractor, discharge certain of the duties of the con-

Exhibit "A"—(Continued)

tractor under such principal contract as hereinafter more particularly set forth or referred to.

Now, Therefore, the parties hereto do mutually acknowledge and agree as follows:

1. The contractor engages and the sub-contractor agrees that, under the general supervision of the contractor, the sub-contractor, upon receipt from the contractor of written notice to proceed, will furnish all labor and materials, tools, machinery, equipment, facilities, supplies and services, and do all the things more specifically set forth and described in Schedule "A" hereto attached, all in accordance in all respects with those certain specifications attached hereto and designated Schedule "B", such specifications by this reference thereto being incorporated herein and made a part hereof; any of such matters or things by the specifications specifically provided to be furnished by the contractor or by the United States of America need not be furnished by the sub-contractor hereunder. The sub-contractor agrees that he will commence work under this contract within 2 days from and after the receipt by him of such written notice to proceed from the contractor, and further promises and agrees to prosecute all of his work hereunder diligently and to co-ordinate his work with the work of other persons so that the sub-contract work may be completed on or before the 15th day of April, 1948. It mutually is acknowledged that time is of the essence of this sub-contract. By virtue hereof the sub-contractor binds himself to the contractor and to the United

Exhibit "A"—(Continued)

States of America to comply fully with all of the undertakings and obligations of the contractor under the principal contract, excepting only such [62] matters as shall not apply to the sub-contractor's work hereunder as set forth in said principal contract.

2. The sub-contractor further promises and agrees to perform all of his work hereunder pursuant to, and to supply all of the materials provided for herein, to, and otherwise to be fully bound by and perform each and every of the terms, provisions and conditions as contained in the principal contract and as shall be applicable to the services to be performed and the materials to be supplied by the sub-contractor hereunder. In the event that for any reason any doubt should arise as to the applicability of any of the terms, provisions or conditions of the principal contract with respect to said services or materials to be rendered and supplied by the sub-contractor hereunder, then the conclusion of the contractor with respect to said applicability or inapplicability shall be conclusive and final.

3. The consideration for the work to be done hereunder inclusive of the services to be rendered and materials to be furnished shall be the sum of \$80,000.00 (Eighty thousand and no/100 Dollars—). All of such work to be done, services to be rendered and materials to be furnished shall be in strict accordance with the specification, schedules and drawings applicable, all of which same hereby are made

Exhibit "A"—(Continued)

a part hereof, and none of the same may be altered, changed or modified in any manner or respect without the written consent of the contractor being first had and obtained. The aforementioned consideration shall be paid to the sub-contractor upon invoices and vouchers surrendered therefor, in such manner and form as shall be prescribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion, affecting the generalities of the references to the principal contract and the agreements of the sub-contractor hereunder to be bound thereby, payments shall be made by the contractor to the sub-contractor only in accordance with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the sub-contractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of said Article 16.

4. As a condition precedent to the granting of this sub-contract to the sub-contractor, and in order to induce the principal contractor to make and enter into the same, with respect to the work provided to be done by the sub-contractor hereunder, the sub-contractor agrees to furnish to and deposit with the principal contractor, concurrently with the signing of this contract, a performance bond to the extent of fifty per cent of the contract price as specified

Exhibit "A"—(Continued)

in Paragraph 3 hereof above and also a payment bond likewise to the extent of fifty per cent of said contract price, each with good and sufficient surety or sureties satisfactory to the principal contractor. Should any surety upon any bond furnished in connection with the sub-contract become unacceptable to the principal contractor, or if any such surety shall fail to furnish reports as to its or his financial condition from time to time as requested by the principal contractor, then the sub-contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the principal contractor or of the Government of the United States of America, or of any person supplying labor or materials in the prosecution of the work contemplated by the sub-contractor.

5. Subject to the approval of the United States of America through its duly authorized representatives with respect to said principal contract, or at the request or direction of said United States of America, or its duly authorized representatives, the contractor, by written order, may change the extent or [63] amount of the work covered and to be covered by this sub-contract, but if any such change causes a material increase or decrease in the amount or character of such work, the contractor will make such equitable adjustment as may be authorized and approved by the United States of America of and in connection with the consideration and payments to be made to the sub-contractor hereunder. In the event that the contractor and sub-contractor

Exhibit "A"—(Continued)

shall fail to agree upon any such equitable adjustment as aforesaid, then without the stoppage of any work by the sub-contractor hereunder the dispute shall be determined as provided by the terms, provisions and conditions contained in the principal contract, as applied to the circumstances of the dispute between the sub-contractor and the contractor accordingly. In the event that this sub-contract is terminated before the work provided for hereby shall be completed, the sub-contractor shall be reimbursed in the manner herein and under the principal contract provided, but subject to all of the other terms, provisions and conditions contained in the principal contract as applicable hereunder.

6. It specifically is understood and agreed that the interpretation and construction of all of the terms, provisions, and conditions contained in this sub-contract shall be subject to the interpretation and construction of the principal contract and all such interpretations and constructions of the principal contract shall be fully binding upon each of the parties hereto.

7. All alterations, modifications and changes of the within subcontract are recited and referred to in Schedule "C" hereto attached; in the event that no such Schedule "C" shall be so attached then the word "none" will be written following this paragraph to indicate that there have been no alterations, changes or modifications of the within subcontract.

Exhibit "A"—(Continued)

In Witness Whereof, the parties hereto have executed this sub-contract at the place and upon the date first hereinabove written.

WM. RADKOVICH COMPANY, INC.

/s/ By WM. RADKOVICH,

President

Witnesses to Signature of Contractor: Signed Eugene H. Parks.

/s/ E. B. WOOLLEY,

Sub-Contractor

By Owner

Witnesses to Signature of Sub-Contractor: Signed M. V. Colling.

Schedule "A"

(Sub-Contract of E. B. Woolley; dated July 30, 1947.)

The description of the work to be done hereunder is as follows:

See Section 15-01 "Scope" of Specifications for Temporary Family Quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air Field, Muroc, California. [64]

Schedule "B"

(Sub-Contract of E. B. Woolley; dated July 30, 1947.)

The specifications applicable to the work to be done hereunder are as follows:

Specifications for Temporary Family Quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air

Exhibit "A"—(Continued)

Field, Muroc, Calif. Section 15 Paragraphs 15-01 through 15-26.

Schedule "C"

The alterations, changes and modifications of the sub-contract of E. B. Woolley dated July 30, 1947 to which this Schedule is attached are as follows: None. [65]

EXHIBIT "B"

[Letterhead of Glens Falls Indemnity Company]

Bond No. 320853

PAYMENT BOND

Know All Men By These Presents, That we, E. B. Woolley, as Principal, and Glens Falls Indemnity Company, a New York corporation of Glens Falls, New York, as Surety, are held and firmly bound unto Wm. Radkovich Company, Inc., hereinafter called the Obligee, in the penal sum of Forty Thousand (\$40,000.00) for the payment of which sum well and truly be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with the United States of America, per the War Department dated June 19, 1947, for construction contract, War Department.

Whereas, said Principal on the 30th day of July, 1947, entered into a written subcontract agreement

Exhibit "B"—(Continued)

with Wm. Radkovich Company, Inc., for Electrical wiring of 100 homes, see section 15-01 "Scope" of specifications for temporary family quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air Field, Muroc, California.

Now, Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

Signed and Sealed this 6th day of August, 1947.

E. B. WOOLLEY,

Principal

GLENS FALLS INDEMNITY
COMPANY

By

Attorney

Refer to Performance Bond for charge for both bonds. [66]

PERFORMANCE BOND

Know All Men By These Presents, That we E. B. Woolley, as Principal, and Glens Falls Indemnity Company, a New York Corporation, of Glens Falls, New York, as Surety, are held and firmly bound unto Wm. Radkovich Company, Inc., hereinafter

Exhibit "B"—(Continued)

called the Obligee, in the penal sum of Forty Thousand (\$40,000.00) for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with United States of America, per the War Department, dated June 19, 1947, for construction contract, War Department, contract No. W-04-353-eng-2050.

Whereas, said Principal on the 30th day of July, 1947 entered into a written sub-contract agreement with Wm. Radkovich Company, Inc., Obligee, for Electrical wiring of 100 homes, see section 15-01, "Scope" of specifications for temporary family quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air Field, Muroc, California.

Now, Therefore, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the _____ with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made notice of which modifications to the Surety being hereby waived, then, this obliga-

Exhibit "B"—(Continued)

iton to be void; otherwise to remain in full force and virtue.

This Bond Is Executed Upon the Following Conditions Precedent to the Right to Recover Hereunder:

The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified:

The said Surety shall be notified in writing of any act on the part of said Principal, or its agents or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, or any representative duly authorized to oversee the performance of said subcontract, and a registered letter mailed to the said Surety, at its principal office in the city of Glens Falls, state of New York, or its Pacific Coast Department in the city of San Francisco, state of California; shall be the notice required within the meaning of this bond:

If the said Principal shall abandon said subcontract, or be compelled by the owner to cease operations thereunder, then the Surety shall have the right, in its option, to assume the said subcontract and to sublet or complete the same; and if said subcontract shall be assumed by the Surety, any reserve, deferred payments and all other moneys provided by said subcontract to be paid to the Principal,

Exhibit "B"—(Continued)

shall be paid to the Surety and under the same conditions as by the terms thereof, such moneys would have been paid to the Principal had the subcontract been duly performed by the Principal. And if said Obligeé shall complete or relet the said subcontract, then any forfeitures provided in said subcontract against the Principal, shall not be operative as against the Surety, but all reserves, deferred payments [67] and all other moneys provided in said subcontract, which would have been paid to the Principal had the Principal completed the subcontract in accordance with its terms, shall be paid to the Surety;

The Surety shall not be liable for any damages resulting from an Act of God, or from a mob, riot, civil commotion or a public enemy; or from so-called "strikes" or labor difficulties; or from accident, fire, lightning, tornado or cyclone, and the Surety shall not be liable for the reconstruction or repair of any work or materials damaged or destroyed by said causes or any of them;

This bond does not cover any provisions of the subcontract or specifications respecting guarantees of efficiency or wearing qualities or for maintenance or repairs nor does it obligate the Surety to furnish any other bond covering such provisions of the subcontract or specifications.

No right of action shall accrue under this bond to or for the use of any person other than the Obligeé named herein.

That any suit brought on this bond must be in-

Exhibit "B"—(Continued)

stituted within one (1) year from the completion of the work under the subcontract herein mentioned.

Signed and Sealed this 6th day of August, 1947.

.....
Principal
GLENS FALLS INDEMNITY
COMPANY,

/s/ By M. KLOTZ,
Attorney

The rate of premium on this bond is \$7.50 per thousand. Total amount of premium charged: \$600.

State of California,
County of Los Angeles—ss.

On this 6th day of August in the year One Thousand Nine Hundred and forty-seven before me, Harry Leonard, a Notary Public in and for the said County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared M. Klotz, known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof I have hereunto set my hand

Exhibit "B"—(Continued)

and affixed my official seal in the County of Los Angeles, the day and year in this certificate first above written.

[Seal] /s/ HARRY LEONARD,
Notary Public in and for the County of Los Angeles, State of California. My commission expires Nov. 15, 1948. [68]

Acknowledgment of Service attached. [69]

[Endorsed]: Filed Aug. 29, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT, E. B. WOOLLEY, TO CROSS-CLAIM

Cross-Defendant, E. B. Woolley, answering for himself alone and not for his co-cross-defendant, admits, denies and alleges as follows:

I.

Answering Paragraph IX of said Cross-Claim, this cross-defendant admits that cross-claimant, Wm. Radkovich Company, Inc., [70] entered upon the performance of its general contract therein mentioned and thereafter completed said contract and in the performance of said work, made and entered into a contract with this cross-defendant, dated July 30, 1947, called a sub-contract, wherein and whereby it was provided that this cross-defendant should perform a certain portion of the work

embraced within the general contract or prime contract thereinbefore in said cross-claim referred to, for a payment to this cross-defendant of \$80,000.00, but denies that the amount of work embraced in said sub-contract included within its scope the furnishing and/or installation of all electrical installations on said job and, in this connection, alleges that the scope of the work embraced in said sub-contract did not include the furnishing or installation of electrical fixtures, chime circuits, phone circuits or added closet lights on said job or any other supplies, equipment, installations or work except the supplies, equipment, installations and work set forth in said sub-contract; except as so expressly admitted, this cross-defendant denies, generally and specifically, each and every, all and singular, the allegations in said Paragraph contained and the whole thereof and denies that the price to be paid this cross-defendant under said sub-contract was subsequently or ever modified, whether in writing or by agreement or otherwise to the sum of \$73,900.00, or any other sum whatsoever other than the sum of \$74,490.00.

II.

Answering Paragraph X of said cross-claim, this answering cross-defendant admits that cross-defendant, Glens Falls Indemnity Company, a corporation, executed its payment bond in connection with the sub-contract between cross-claimant, Wm. Radkovich Company, Inc., and this cross-defendant, but this cross-defendant denies that said bond contained any provisions, terms or conditions other than the

provisions, terms and conditions expressly [71] set out and contained in said bond.

III.

Answering Paragraph XI of cross-claim, this answering cross-defendant admits that there is due, owing and unpaid from cross-claimant, Wm. Radkovich Company, Inc., to this cross-defendant, on account of the performance of said electrical sub-contract, the sum of \$16,562.54, but denies that said sum is the balance that is due or owing or unpaid from said cross-claimant to this cross-defendant and denies that no more or greater sum is so due or owing or unpaid and in this connection this cross-defendant alleges that there is due, owing and unpaid from cross-claimant, Wm. Radkovich Company, Inc., to this cross-defendant, on account of the performance of said electrical sub-contract a balance of \$29,039.73, together with the sum of \$8,385.53, for additional labor and materials furnished said cross-claimant, Wm. Radkovich Company, Inc., from time to time as requested by said cross-defendant, all as more particularly set forth in the first and second causes of action of the cross-claim for the benefit of this cross-defendant, to be filed concurrently herewith, together with the sum of \$16,176.58, for damages as set forth in the third cause of action of said cross-claim.

Wherefore, this cross-defendant prays that cross-claimant, Wm. Radkovich Company, Inc., take nothing by reason of its cross-claim on file herein and

that this cross-defendant be given the relief prayed for in the cross-claim for his benefit filed concurrently herewith and for such other and further relief as to the Court may seem meet and just.

/s/ FRANK M. BENEDICT,

Attorney for Cross-Defendant,

E. B. Woolley

[72]

Affidavit of Service by Mail attached.

[73]

[Endorsed]: Filed Sept. 2, 1949.

In the District Court of the United States, Southern
District of California, Central Division

No. 9303-Y

UNITED STATES OF AMERICA, et al.,
Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC., et al.,
Defendants.

WM. RADKOVICH COMPANY, INC., et al.,
Cross-Claimants,

vs.

E. B. WOOLLEY and GLENS FALLS IN-
DEMNITY COMPANY, a corporation,
Cross-Defendants.

UNITED STATES OF AMERICA, at the Rela-
tion of and to the Use of E. B. WOOLLEY,
Cross-Claimant,

vs.

WM. RADKOVICH COMPANY, INC., a corpora-
tion, UNITED PACIFIC INSURANCE COM-
PANY, a corporation, GENERAL CASUALTY
COMPANY OF AMERICA, a corporation, EX-
CESS INSURANCE COMPANY OF AMER-
ICA, a corporation, and MANUFACTURERS'
CASUALTY COMPANY, a corporation,
Cross-Defendants.

CROSS-CLAIM

Upon Bond and Against Contractor for Materials
and Labor Upon Government Contract

I.

Cross-claimant avers that E. B. Woolley, for
whose benefit [74] this action is brought, is a sub-

contractor who furnished labor and materials in the prosecution of the work provided in a certain contract entered into between cross-defendant, Wm. Radkovich Company, Inc., a corporation, as general contractor, and the United States of America, dated the 19th day of June, 1947, for the construction of public works within the meaning of the Act of Congress of August 24, 1935 (49 Statutes 793), being the Federal Public Works Bond Act, commonly known as the "Miller Act."

II.

That the cross-defendant Wm. Radkovich Company, Inc., is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California, with an office and its principal place of business in the County of Los Angeles, State of California, and at all times herein mentioned was and now is a duly licensed contractor in the State of California.

III.

That cross-defendant United Pacific Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

IV.

That cross-defendant General Casualty Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized [75] to write such surety bonds and to do business therein.

V.

That cross-defendant Excess Insurance Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said state and to do business therein.

VI.

That cross-defendant Manufacturers' Casualty Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, and authorized by law to engage in the business of writing surety bonds, and having by virtue of the compliance with the laws of the State of California become author-

ized to write such surety bonds in said State and do business therein.

VII.

That pursuant to a printed invitation for bids given by the War Department of the United States of America, the cross-defendant, Wm. Radkovich Company, Inc., submitted its bid and was awarded the contract for the performance of all the work required for the construction of Temporary Family Quarters, Job No. Muroc AAF 7-210-2, at Muroc Army Air Field, Muroc, California, in accordance with the plans and specifications for the construction of said work.

That the contract so awarded was made and executed and bears date of June 19, 1947; that by the terms of said building contract, it was provided that said cross-defendant, Wm. Radkovich Company, Inc., should erect and construct the improvements [76] above referred to as the prime contractor for the United States of America as owner, at Muroc, California, for an estimated contract price of \$749,999.50, as required by the plans and specifications referred to in said contract.

VIII.

That for the valuable and adequate considerations, moving severally to the cross-defendants-Surety Companies next named, the United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a

corporation, severally made, executed and delivered, and the said companies caused to be filed with the proper government officials a certain Standard Form of Payment Bond, pursuant to said Act of Congress approved August 24, 1935, (49 Statutes 793), whereby in the aggregate said four cross-defendants-Surety Companies bound themselves as sureties for said cross-defendant Wm. Radkovich Company, Inc., a corporation, unto the United States of America in the aggregate penal sum of \$374,999.75, and wherein in said bond it is recited that said sureties, while being bound firmly by said bond jointly and severally, are bound under the terms of the following proviso:

“Provided, That we Sureties bind ourselves in such sum ‘jointly and severally’ as well as ‘severally’ only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule”, in which schedule the respective limits of liability for said respective four defendant-Surety Companies is set forth as \$93,749.94, and in which bond, subject to the proviso above set forth, it is agreed that if the principal should faithfully perform its contract and all of its terms, covenants and conditions, [77] and should promptly pay to all persons supplying the principal with labor and materials in the prosecution of the work in the contract provided, then the obligation is to be void; otherwise it shall remain in full force and effect.

That said bond is and at all times since the execution and delivery thereof as aforesaid, has been in full force and effect; that the cross-defendant Wm. Radkovich Company, Inc., joined in the execution of said bond as principal.

IX.

That thereafter the said cross-defendant, Wm. Radkovich Company, Inc., entered upon the performance of said contract and thereafter completed said contract, and in the performance of said work made and entered into a contract with the said E. B. Woolley, dated July 30, 1947, called a subcontract, wherein and whereby it was provided that the said E. B. Woolley should perform a certain portion of the work embraced within said general contract or prime contract consisting of the furnishing by the said E. B. Woolley of all labor, equipment, supplies and materials, (except equipment designated to be furnished by the Government) including pilot lamps, and performing all operations necessary for the installation of complete interior wiring systems, duct systems, and electric service connections in strict accordance with Section 15 of the specifications referred to in said prime contract and in the applicable drawings, and subject to the terms and conditions of said prime contract and cross-defendant, Wm. Radkovich Company, Inc., agreed to pay the said E. B. Woolley therefor the sum of \$80,000.00, subsequently reduced in amount to the sum of \$74,490.00 because of the deletion from said sub-

contract of the furnishing by said E. B. Woolley of electric water heaters.

X.

That thereafter and in pursuance of said subcontract, the said E. B. Woolley furnished all labor, equipment, supplies and [78] materials and performed all operations necessary for the installation of complete wiring systems, duct systems and electric service connections called for in said subcontract and that all of said materials and labor were furnished to be used and were actually used in and about the construction of said improvements, above mentioned.

XI.

That in addition thereto and at the special instance and request of cross-defendant, Wm. Radkovich Company, Inc., the said E. B. Woolley furnished additional labor and materials from time to time as requested by said cross-defendant, of the reasonable value of \$8,385.53, and that said additional labor and materials were furnished to be used and were actually used in and about the erection and construction of said improvements, and that the said price of \$8,385.53 was and now is the reasonable value of said materials and labor then prevailing.

XII.

That no part of said sum of \$74,490.00 referred to in Paragraph IX hereof and no part of said sum of \$8,385.53 referred to in Paragraph XI hereof,

making a total sum of \$82,875.53, has been paid, except the sum of \$45,450.27, and there is now due, owing and unpaid from said cross-defendant, Wm. Radkovich Company, Inc., to the said E. B. Woolley the sum of \$37,425.26.

XIII.

That the War Department of the United States of America was duly authorized and empowered by law to undertake the construction of said buildings and improvements and that the same were undertaken and built upon land owned by the United States of America at Muroc, California.

XIV.

That said subcontract has been fully performed on the part of the said E. B. Woolley and that the furnishing of all labor, [79] equipment, supplies and materials, wiring systems, duct systems, and electrical service connections called for in said subcontract was completed by the said E. B. Woolley on the 6th day of October, 1948, and that more than 90 days have elapsed from the date of the furnishing of the last thereof and that this action is being filed before the expiration of one year after the date of final settlement of said prime contract.

XV.

That at all times mentioned in this cross-claim, and at all times during the performance of each act and of the sub-contract herein mentioned, the said

E. B. Woolley was, and now is, a duly licensed electrical contractor.

For a Further, Separate and Second Cause of Action, Cross-Claimant Avers:

I.

Cross-claimant incorporates herein by reference the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, XIII and XV of its first cause of action with the same force and effect as though the same were set out in full herein.

II.

That between the 8th day of August, 1947, and the 6th day of October, 1948, at the special instance and request of cross-defendant, Wm. Radkovich Company, Inc., and upon its promise to pay the reasonable value thereof, the said E. B. Woolley furnished certain electrical equipment, supplies and materials and labor to install the same on said work of improvement above mentioned and that the current market price and reasonable value of the said equipment, supplies, materials and labor was the sum of \$82,875.53; that no part thereof has been paid except the sum of \$45,450.27 and that the balance thereof, to wit: The sum of \$37,425.26, is now due, owing and unpaid; that all of said electrical equipment, supplies, materials and labor were furnished to be used and were [80] actually used in the performance of said work of improvement and in

connection with the performance of said prime contract.

For a Further Separate and Third Cause of Action, Cross-Complaint Avers:

I.

Cross-claimant incorporates herein by reference the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, and X of its first cause of action with the same force and effect as though the same were set out in full herein.

II.

That by the terms of said subcontract, it was provided that the said E. B. Woolley would commence work thereunder within two days from and after the receipt by him from cross-defendant, Wm. Radkovich Company, Inc., of written notice to proceed and would prosecute all of his work thereunder diligently and coordinate his work with the work of other persons so that the subcontract work would be completed on or before the 15th day of April, 1948, and that cross-defendant, Wm. Radkovich Company, Inc., would permit said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and would have said buildings and improvements ready and in condition so that said E. B. Woolley could prosecute without delay, his work thereunder so that said E. B. Woolley could complete said subcontract work on or before the 15th day of April, 1948; that on

or about the 8th day of August, 1947, the said E. B. Woolley received written notice to proceed under said subcontract from said cross-defendant, Wm. Radkovich Company, Inc., and was thereafter instructed by said Wm. Radkovich Company, Inc., to commence work under said subcontract on September 1, 1947.

III.

That although the said E. B. Woolley was ready, willing and able to commence work under said subcontract and enter upon [81] the performance thereof on September 1, 1947, as instructed by said cross-defendant, Wm. Radkovich Company, Inc., he was prevented from so doing by said cross-defendant due to the failure, neglect and refusal of said cross-defendant to permit the said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said work of improvement ready and in condition so that the said E. B. Woolley could proceed with his work under said subcontract; that from the said September 1, 1947, to October 6, 1947, said E. B. Woolley continued to be and was ready, willing and able to commence work under said subcontract and enter upon the performance thereof but due to such failure, neglect and refusal of said cross-defendant, Wm. Radkovich Company, Inc., was prevented from doing so until said last mentioned date, to the damage of the said E. B. Woolley in the sum of \$1,149.22.

IV.

That thereafter said E. B. Woolley was ready,

willing and able to prosecute all of his work under said subcontract diligently and coordinate his work with the work of other persons so that said subcontract work would have been completed on or before the 15th day of April, 1948, but was prevented from so doing by said cross-defendant, Wm. Radkovich Company, Inc., due to the repeated failure, neglect and refusal of said cross-defendant to permit said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said buildings and improvements ready and in condition so that the said E. B. Woolley could prosecute without delay his work under said subcontract, with the result that said E. B. Woolley was prevented from completing said subcontract work until October 6, 1948, to the further damage of said E. B. Woolley in the sum of \$15,027.36. [82]

V.

Cross-claimant incorporates herein by reference the allegations contained in Paragraphs XIII, XIV and XV of its first cause of action with the same force and effect as though the same were set out in full herein.

Wherefore, the United States of America at the relation of and to the use of said E. B. Woolley cross-claimant herein, prays judgment against the cross-defendants as follows:

1. Against the cross-defendant, Wm. Radkovich Company, Inc., for the sum of \$53,601.84, plus interest on the sum of \$37,425.26 from the 15th day

of April, 1948, and interest on the sum of \$16,176.58, from the 6th day of October, 1948, at the rate of 7% per annum until paid;

2. Against the cross-defendants, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, and each of them, jointly and severally, in a like sum as is prayed against their principal, Wm. Radkovich Company, Inc.;

3. For cross-claimant's costs of suit in this action expended; and

4. For such other and further relief as to the Court may seem meet and proper and consistent with equity.

/s/ FRANK M. BENEDICT,

Attorney for Cross-Claimant [83]

Affidavit of Service by Mail attached. [84]

[Endorsed]: Filed Sept. 7, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT WM. RADKOVICH COMPANY, INC., TO CROSS-CLAIM OF UNITED STATES OF AMERICA

Comes now Wm. Radkovich Company, Inc., a corporation, one of the [86] cross-defendants, and answering for itself alone and not for its co-cross-defendants the cross-claim of United States of

America, at the Relation and to the Use of E. B. Woolley, admits, denies and alleges as follows:

I.

Admits the allegations in paragraphs numbered I, II, III, IV, V, VI, VII and VIII.

II.

Admits the averments in paragraph IX, except that this cross-defendant alleges that said electric subcontract referred to therein, by its terms as subsequently modified and agreed to by cross-claimant E. B. Woolley, and this cross-defendant, provided for payment to said cross-complainant of the aggregate sum of \$73,900.00 because of the elimination from said subcontract of the furnishing by said E. B. Woolley of electric water heaters in the amount of \$6,100.00, which was the amount for said item specified by the general contract.

III.

Denies the averments in paragraph numbered X and alleges on the contrary that cross-defendant Wm. Radkovich Company, Inc., a corporation, was compelled, at its own expense, to furnish labor and materials to the amount of \$7,887.09 to complete said subcontract upon the refusal, neglect and failure of said E. B. Woolley to complete said subcontract.

IV.

Denies the averments in paragraph XI.

V.

Answering the averments in paragraph numbered XII this cross-defendant denies that there is any sum whatsoever due, owing and unpaid, or due or owing or unpaid, from said cross-defendant to said E. B. Woolley, except the sum of \$16,562.64, and alleges that the payment of said sum by this cross-defendant to cross-claimant has been prevented by the filing of liens and claims on behalf of furnishers of material to said cross-complainant in connection with the work performed by said cross-complainant under said subcontract. [87]

VI.

Admits the allegation in paragraph numbered XIII.

VII.

Denies the averments in paragraph XIV, except that this cross-defendant admits that more than ninety days have elapsed since cross-complainant furnished any labor or material upon said job.

VIII.

Admits the averments in paragraph numbered XV.

Answering the Second Cause of Action of Said Cross-Claim:

I.

Cross-defendants incorporates herein by reference its answers to paragraphs numbered I, II, III, IV, V, VI, VII, VIII, XIII and XV of the first

cause of action with the same force and effect though the same were set out in full herein.

II.

Denies the averments in paragraph II of said second cause of action, except that it admits the cross-complainant furnished certain electric equipment, supplies, materials and labor between the 8th day of August, 1948, and the 6th day of October, 1948, pursuant to a subcontract entered into between cross-defendant and cross-complainant under date of July 30, 1947, and admits that there is a balance owing on said subcontract to the cross-complainant of the sum of \$16,562.64 which the cross-defendant avers it is ready, willing and able to pay upon the withdrawal and satisfaction of claim filed against this cross-defendant filed on behalf of persons claiming to have supplied cross-complainant with labor and materials in the prosecution of work under said subcontract.

Answering the Third Cause of Action of Said Cross-Claim:

I.

Said cross-defendant refers to and adopts its answers to paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first cause of action with the same force and effect as though the same were set out in full herein. [88]

II.

Answering the averments in paragraph II cross

defendant denies that said subcontract contained any provisions or conditions as alleged in paragraph I, or otherwise, except the terms and conditions specifically set forth in said subcontract, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof, and cross-defendant denies generally and specifically, each and every other allegation in paragraph II.

III.

Denies the averments in paragraphs numbered III and IV.

IV.

Answering the averments in paragraph V of the third cause of action of said cross-claim cross-defendant refers to and adopts its answers to paragraphs XIII, XIV and XV of the first cause of action with the same force and effect as though the same were set out in full herein.

For a Second Defense to Said Cross-Claim Cross-defendant Avers:

I.

That all labor and material furnished by said cross-complainant for which the cross-complainant now seeks recovery as for additional labor and materials were in fact provided to be furnished by said cross-complainant as subcontractor under the terms and conditions of the subcontract entered into between cross-defendant and cross-complainant under date of June 30, 1947, and the specifications of the principal contract entered into between cross-

defendant and United States of America and expressly made a part of the subcontract entered in between cross-defendant and cross-complainant and under which said cross-complainant furnished said labor and material.

Wherefore, cross-defendant prays that the cross-complainant take nothing by his said cross-claim and that it be awarded judgment for its costs here incurred, and for such other and further relief herein may seem proper.

ANDERSON, McPHARLIN
& CONNERS,

/s/ By ELDON V. McPHARLIN,

Attorneys for Cross-Defendant [8]

[Printer's Note: Attached Exhibit "A" a duplicate of Exhibit "A" set out in full pages 42 to 49 of this printed Record.]

Affidavit of Service by Mail attached. [94]

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANTS UNITED
PACIFIC INSURANCE COMPANY, ET AL
TO CROSS-CLAIM.

Come now United Pacific Insurance Company, Corporation, [95] General Casualty Company of America, a Corporation, Excess Insurance Company

of America, a Corporation, and Manufacturers' Casualty Insurance Company, a Corporation, cross-defendants, and answering for themselves the cross-claim of E. B. Woolley on file herein, admit, deny and allege as follows:

I.

Answering paragraph I of the cross-claim these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph.

II.

Admit the averments in paragraphs numbered II, III, IV, V, VI, VII and VIII.

III.

Admit the averments in paragraph IX, except that these cross-defendants allege on information and belief that said electric subcontract referred therein, by its terms as subsequently modified and agreed to by cross-defendant Wm. Radkovich Company, Inc., and cross-complainant E. B. Woolley, provided for payment to said cross-complainant of the aggregate sum of \$73,900.00 instead of the sum of \$74,490.00 as alleged in said paragraph.

IV.

That these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs numbered X, XI and XII.

V.

Admit the allegations in paragraph number XIII.

VI.

That these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs numbered XIV and XV.

For Answer to the Separate and Second Cause of Action of Said Cross Claim: [96]

I.

Cross-defendants incorporate herein by reference their answers to paragraphs I, II, III, IV, V, VI, VII, VIII, XIII and XV of the first cause of action with the same force and effect as though the same were set out in full herein.

II.

That these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered II of the second cause of action of said cross claim.

Answering the Third Cause of Action of Said Cross-Claim:

I.

Cross-defendants incorporate herein by reference their answers to paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first cause of action

said cross-claim with the same force and effect though the same were set out in full herein.

II.

That these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraphs numbered I, II, III and IV of the third cause of action of said cross-claim.

III.

Cross-defendants incorporate herein by reference their answers to paragraphs XIII, XIV and XV of the first cause of action of said cross-claim with the same force and effect as though the same were set out in full herein.

For a Further and Separate Defense These Cross-defendants Allege:

I.

That the bond severally executed by them as surety for said Wm. Radkovich Company, Inc., a corporation, and referred to in paragraph VIII of the first cause of action of said cross-claim was a standard form of payment bond pursuant to the act of Congress approved August 24, 1935, (49 Statutes, 793) and is not by its terms and conditions on the part of cross-defendants to be performed liable for losses, if any, sustained because of breach of contract by [97] cross-defendant Wm. Radkovich Company, Inc., causing delays and that if the cross-complainant sustained damages as in his third

cause of action averred, that the same are whole without the terms of cross-defendants' said bond.

Wherefore, cross-defendants pray that cross-complainant take nothing by his said cross-claim and that these cross-defendants be awarded judgment for their costs herein incurred and for such other and further relief as may appear proper.

ANDERSON, McPHARLIN
& CONNERS,

/s/ By ELDON V. McPHARLIN,
Attorneys for Cross-Defendants [9]

Affidavit of Service by Mail attached. [99]

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

STIPULATION FOR FILING SUPPLEMENT
AND AMENDMENT TO CROSS-CLAIM
AND ORDER THEREON

It is Hereby Stipulated by and between the parties to the above entitled action, through their respective attorneys, that the supplement and amendment to the cross-claim of the United States America, at the relation of and to the use of E. Woolley, may be filed herein and the Court may make its order permitting such filing forthwith, and without further notice to any of the parties, receipt of a copy of which supplement and amendme

ing hereby acknowledged as having been made on
e parties concerned this 27th day of July, 1950.

Dated: July 27, 1950.

ANDERSON, McPHARLIN
& CONNERS,

/s/ By ELDON V. McPHARLIN,
Attorneys for Wm. Radkovich
Company, Inc., and its sureties.

JOHN E. McCALL and
HAROLD J. DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Glens Falls In-
demnity Company

/s/ JOHN M. BENEDICT,
Attorney for E. B. Woolley

It Is So Ordered. Aug. 3, 1950.

/s/ JACOB WEINBERGER,
Judge of the U. S. District Court.

[Endorsed]: Filed Aug. 11, 1950. [103]

[Title of District Court and Cause.]

SUPPLEMENT AND AMENDMENT
TO CROSS-CLAIM

Pursuant to the order of the Court permitting the filing of this supplement and amendment to the cross-claim of the United States of America, and the relation of and to the use of E. B. Woolley as cross-claimant in the above entitled action, the following numbered paragraphs of said cross-claim are hereby amended to read as follows:

First Cause of Action:

XII.

That no part of said sum of \$74,490.00 referred to in Paragraph IX hereof and no part of said sum of \$8,385.53 referred to in Paragraph XI hereof making a total sum of \$82,875.53, has been paid, except the sum of \$68,225.84, and there is now due and owing and unpaid from said cross-defendant, Wm. Radkovich Company, Inc., to [105] the said E. B. Woolley the sum of \$14,649.69.

Second Cause of Action:

II.

That between the 8th day of August, 1947, and the 6th day of October, 1948, at the special instance and request of cross-defendant Wm. Radkovich Company, Inc., and upon its promise to pay the reasonable value thereof, the said E. B. Woolley furnished certain electrical equipment, supplies and

materials and labor to install the same on said work of improvement above mentioned and that the current market price and reasonable value of the said equipment, supplies, materials and labor was the sum of \$93,052.11; that no part thereof has been paid except the sum of \$68,225.84, and that the balance thereof, to wit: The sum of \$24,826.27 is now due, owing and unpaid; that all of said electrical equipment, supplies, materials and labor were furnished to be used and were actually used in the performance of said work of improvements and in connection with the performance of said prime contract.

Third Cause of Action:

II.

That by the terms of said subcontract, it was provided that the said E. B. Woolley would commence work thereunder within two days from and after the receipt by him from cross-defendant, Wm. Radkovich Company, Inc., of written notice to proceed and would prosecute all of his work thereunder diligently and coordinate his work with the work of other persons so that the subcontract work could be completed on or before the 15th day of April, 1948, and that cross-defendant, Wm. Radkovich Company, Inc., would permit said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and would have said buildings and improvements ready and in condition so that said E. B. Woolley could prosecute, without delay, his work thereunder so

that said E. B. Woolley could complete said subcontract work on or before the 15th day of April, 1948; that on or about the 8th day of August, 1947, the said E. B. Woolley received written notice to proceed under said subcontract from said cross-defendant, Wm. Radkovich Company, Inc., and was thereafter instructed by said Wm. Radkovich Company, Inc., to commence work under said subcontract on August 28, 1947.

III.

That although the said E. B. Woolley was ready, willing and able to commence work under said subcontract and enter upon the performance thereof on August 28, 1947, as instructed by said cross-defendant, Wm. Radkovich Company, Inc., he was prevented from so doing by said cross-defendant due to the failure, neglect and refusal of said cross-defendant to permit the said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said work of improvement ready and in condition so that the said E. B. Woolley could proceed with his work under said subcontract; that from the said August 28, 1947, to October 1, 1947, said E. B. Woolley continued to be and was ready, willing and able to commence work under said subcontract and enter upon the performance thereof but due to such failure, neglect and refusal of said cross-defendant Wm. Radkovich Company, Inc., was prevented from doing so until said last mentioned date, to the damage of the said E. B. Woolley in the sum of \$1,149.22.

IV.

That thereafter said E. B. Woolley was ready, willing and able to prosecute all of his work under said subcontract diligently and coordinate his work with the work of other persons so that said subcontract work would have been completed on or before the 15th day of April, 1948, but was prevented from so doing by said cross-defendant, Wm. Radkovich Company, Inc., due to the repeated failure, neglect and refusal of said cross-defendant to permit said E. B. Woolley to [107] proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said buildings and improvements ready and in condition so that the said E. B. Woolley could prosecute without delay his work under said subcontract, with the result that said E. B. Woolley was prevented from completing said subcontract work until October 6, 1948, to the further damage of said E. B. Woolley in the sum of \$9,027.36.

Prayer:

1. Against the cross-defendant, Wm. Radkovich Company, Inc., for the sum of \$24,826.27, plus interest thereon at the rate of 7% per annum from October 6, 1948.

/s/ FRANK M. BENEDICT,

Attorney for Cross-Claimant.

[Endorsed]: Filed Aug. 11, 1950. [108]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for all the parties that the Cross-Claim of Wm. Radkovich Company, Inc., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excelsior Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, filed April 12, 1949, may be amended by [114] substituting the attached page 5 in the place and stead of page 5 of said Cross-Claim.

It is further stipulated that the Answer of Cross-Defendant Glens Falls Indemnity Company, a corporation, filed August 29, 1949, to said Cross-Claim be amended by substituting the attached page 2 in the place and stead of page 2 of said Answer filed August 29, 1949.

It is further stipulated that the Performance Bond No. 320853 may be filed as a part of said Defendant's Exhibit "B".

Dated: October 27th, 1950.

ANDERSON, McPHARLIN
& CONNERS

/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants and
Cross-Claimants.

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant
E. B. Woolley.

/s/ GLEN BEHYMER,
Attorney for Plaintiff.

JOHN E. McCALL and
J. HAROLD DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Glens Falls
Indemnity Company.

It is so ordered.

It is further ordered that the Clerk make the
above mentioned substitutions and additions.

Dated: October 31, 1950.

/s/ JACOB WEINBERGER,
Judge of the United States District
Court. [115]

[Page 5]

IX.

That thereafter the said cross-claimant Wm.
Radkovich Company, Inc., entered upon the per-
formance of its contract and thereafter completed
said contract, and in the performance of said work
employed the cross-defendant E. B. Woolley as a
subcontractor to perform a certain portion of the
work embraced within the general contract or prime
contract hereinbefore referred to; that said sub-
contract included within its scope the furnishing
of all labor and material, tools, machinery, equip-
ment, facilities, supplies and services, and to do all
the things more specifically set forth and de-
scribed therein, all in accordance in all respect with

the certain specifications attached thereto, and including within its scope the furnishing and installation of and payment for all electrical installations on said job as the electrical subcontractor for an agreed cost of \$80,000.00, subsequently modified in writing by agreement between said cross-claimant Wm. Radkovich Company, Inc., and said E. B. Woolley to the sum of \$73,900.00.

X.

That for a valuable and adequate consideration moving to cross-defendant Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and caused to be filed with cross-claimant Wm. Radkovich Company, Inc., a certain payment bond whereby said Glens Falls Indemnity Company bound itself, as surety for said cross-defendant E. B. Woolley, unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of \$40,000.00, and in which bond it is agreed that if the principal shall indemnify and hold the said obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

That for a valuable and adequate consideration moving to cross-defendant [116] Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and

caused to be filed with cross-claimant Wm. Radkovich Company, Inc., a certain performance bond whereby said Glens Falls Indemnity Company bound itself as surety for said cross-defendant E. B. Woolley unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of \$40,000.00, the condition of said bond being that if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the
with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

XI.

That thereafter, the said E. B. Woolley entered upon the performance of his contract and in the performance of said work furnished and [117]

[Page 2]

the general contractor, Wm. Radkovich Company, Inc., by and through its President, Wm. Radkovich, and E. B. Woolley, as subcontractor, on or about the 30th day of July, 1947, but denies that said

subcontract contained any provisions or conditions as alleged in paragraph IX, or otherwise, except the terms and conditions specifically set forth in said subcontract, a copy of which is attached hereto marked Exhibit "A", and denies generally and specifically each and every other allegation in paragraph IX contained.

II.

Answering paragraph X of said Cross-Claim, this defendant admits that on or about the 6th day of August, 1947, it executed and delivered a Payment Bond and a Performance Bond, wherein E. I. Woolley was named as Principal, this defendant was named as Surety, and Wm. Radkovich Company, Inc. was named as Obligee, and that the penalty sum of each bond was \$40,000.00, but defendant denies generally and specifically that said bonds contained any terms or conditions, as alleged in paragraph X, or otherwise, except such terms and conditions as are specifically set out in said bond copies of which are attached hereto as Exhibit "B" and made a part hereof by this reference.

III.

Answering the allegations contained in paragraph XI, this defendant admits that subcontractor E. I. Woolley entered upon the performance of said subcontract, and that there is due subcontractor E. I. Woolley \$16,562.54 under said subcontract, and that a claim has been made against cross-claimants for certain electrical equipment, supplies and material which said Westinghouse Electric Supply Company

as alleged that it sold to said E. B. Woolley for use in the performance of his said subcontract, a copy of which is attached hereto as Exhibit "A".

This defendant has no information or belief sufficient to enable it to answer any of the other allegations contained in paragraph XI, and, placing its denial on that ground, denies that there [118]

[Endorsed]: Filed Nov. 1, 1950.

Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Jacob Weinberger, September . . . , 1951.

Appearances: Glen Behymer, Esq., for plaintiff. Anderson, McPharlin & Connors, Esqs., for Wm. Radkovich Co. and sureties. Frank M. Benedict, Esq., for E. B. Woolley. John E. McCall, Esq., and Harold J. Decker, Esq., for Glen Falls Indemnity Company. [119]

On June 19, 1947, defendant Wm. Radkovich Company, Inc., as prime contractor entered into a contract with the United States for the construction of Temporary Family Quarters for the Army Air Field at Muroc, California, said quarters to consist of 100 poured concrete houses of the "Le Torneau" type, as described in said contract (Exhibit B) and the plans and specifications made a part of said contract. Defendants United Pacific Insurance Company, General Casualty Company of America, Ex-

cess Insurance Company of America, and Manufacturers' Casualty Insurance Company (hereinafter called "Radkovich sureties") severally executed a payment bond on behalf of Radkovich Company. On July 30, 1947, E. E. Woolley as electrical subcontractor entered into a subcontract (Exhibit C) with Radkovich Company for certain electrical work described in said prime contract. Glens Falls Indemnity Company, a cross-defendant herein, executed a performance bond and a payment bond, each in the sum of \$40,000.00, on behalf of Woolley with reference to said subcontract. (Said bonds are part of Exhibit C and are attached to the subcontract).

Westinghouse Electric Supply Company furnished certain materials of the value of \$52,622.22 to Woolley, which materials were used in said construction, and this suit is brought under the Miller Act (Sections 270a and 270b of Title 28 U.S.C.A.) against the Radkovich Company, its sureties and Woolley for the balance due Westinghouse from Woolley, to wit, \$43,514.05.

Since the filing of the action, and on October 27, 1949, Woolley and his surety requested Radkovich Company to pay to Westinghouse Company the sum of \$16,562.54 which Radkovich admittedly owed Woolley under the latter's subcontract, and Radkovich Company paid to Westinghouse [120] Company the sum of \$16,562.04, leaving a balance due Westinghouse Company for materials furnished and used in said construction of the sum of \$26,952.01. The amount last paid Westinghouse has been referred to by counsel at times as \$16,562.54 and

his accounts for a small discrepancy in some of the figures.

In a cross-claim filed against Woolley and his surety, Radkovich Company and its sureties alleged that the surety executed the performance and payment bonds hereinbefore mentioned on behalf of Woolley, that the subcontract provided for the payment to Woolley of the sum of \$80,000.00 for work and materials mentioned in said subcontract, that the amount mentioned in the contract had been subsequently reduced to \$73,900.00 by agreement, that the amount remaining unpaid from Radkovich under said subcontract was the sum of \$16,562.54, and contained a prayer that the court adjudge the sum last mentioned to be the total amount due Woolley under said subcontract, and that judgment against Woolley and his surety be given Radkovich Company for any sum over said last mentioned amount found to be due Westinghouse from Radkovich Company or its sureties.

Glen Falls Company, in an answer to said cross-claim, denied that the sum of \$16,562.54 was the total sum owing Woolley by Radkovich Company, and pleaded that it should be released from liability because of matters stated in such surety's affirmative defenses 2 to 7 inclusive.

Woolley in his answer to the cross-claim of Radkovich Company and sureties denies the reduction of the amount to be paid under the subcontract to any sum other than \$74,490.00, makes further allegations similar to those more particularly set forth in a cross-claim and supplement thereto filed against

Radkovich Company and its sureties. [121] These similar allegations are contained in Paragraph III of his answer, and Woolley states that Radkovich Company is indebted to him in the sum of \$29,039.73 (reduced by \$16,562.04 paid to Westinghouse since the filing of the action) on account of the performance of the said electrical subcontract, together with the sum of \$8,385.53 for additional labor and materials furnished Radkovich Company as requested by it, all as more particularly set forth in the cross-claim filed concurrently therewith, together with the sum of \$16,176.58 for damages as set forth in the third cause of action of the cross-claim; in his prayer, Woolley asks that Radkovich take nothing by his cross-claim and that Woolley be given the relief prayed for in the cross-claim and for such other relief, etc., as may be just.

In said cross-claim (which is in fact a separate suit for it is brought by the United States of America at the relation of and to the use of E. B. Woolley) Woolley set forth that he is a subcontractor who furnished labor and materials in the prosecution of the work provided for in a certain contract entered into between cross-defendant Radkovich Company as general contractor and the United States of America for the construction of public works within the meaning of the Miller Act; the filing of the bond by the Radkovich sureties is alleged, and it is stated that Woolley entered into a subcontract for furnishing labor and materials for a portion of the work embraced in the prime contract, and that Radkovich agreed to pay Woolley the sum of \$80,000.00 for said

work which sum was subsequently [122] reduced to \$74,490.00; that thereafter and in pursuance of said contract, Woolley furnished labor, equipment, supplies and materials and performed the work called for in said subcontract and that all the materials were furnished to be used and were actually used in and about the construction of the improvements mentioned in the prime contract.

In Paragraph XI of the cross-claim, it is alleged that at the special instance and request of Radkovich Company Woolley furnished additional labor and materials of the reasonable value of \$8,385.53, and 'that said additional labor and materials were furnished to be used and were actually used in and about the erection and construction of said improvements * * *.' It is then alleged that no part of said sums has been paid except the sum of \$68,225.84 and that there is now due and owing from Radkovich the sum of \$14,649.69. [123]

The second cause of action incorporates all of the allegations with reference to the prime contract, bond, etc., of the first cause, and states that Woolley furnished certain labor, materials, etc., on the work of improvement mentioned, at the special instance and request of Radkovich Company and upon its promise to pay the reasonable value thereof, and that all of the said labor, materials, etc., "were furnished to be used and were actually used in the performance of said work of improvements and in connection with the performance of said prime contract." That the current market price and reasonable value of the labor, materials, etc., was the sum

of \$93,052.11, and that the sum of \$24,826.27 is unpaid.

The third cause of action incorporates all of the allegations with reference to the prime contract, bond, etc., of the first cause, and sets forth that under the subcontract it was provided that Radkovich Company would have the buildings and improvements ready so that Woolley could proceed with his work under the subcontract so as to complete the same by April 15, 1948, and that he was instructed to commence work under the subcontract on September 1, 1947; that from September 1, 1947, to October 6, 1947, Woolley was ready, able, etc., to commence work but was prevented from beginning work until October 6, 1947, to his damage in the sum of \$1,149.22, due to the failure of the Radkovich Company to have the work ready for him to proceed; that because of a similar failure of Radkovich to have the buildings and improvements in condition so that Woolley could prosecute his work without delay, Woolley was prevented from completing his subcontract work until [124] October 6, 1948, to his damage in the sum of \$9,027.36.

The cross-claim then prays judgment against the Radkovich Company in the sum of \$24,826.27 plus interest thereon at the rate of 7% per annum from October 6, 1948, and judgment against the defendants Radkovich sureties in a like sum as is prayed against their principal.

The cross-claim as amended takes into account the amount paid Westinghouse at the request of Woolley since the trial, also certain amounts conceded by

Woolley and his surety to be due Radkovich Company; it is our recollection that after the trial and during the filing of briefs there was a further concession of counsel for Woolley that some of the damages for delay in completion included some of the charges for labor in installing the so-called "extras" or additional work mentioned in the cross-claim.

In its answer to Woolley's cross-claim and supplement thereto Radkovich Company repeats some of the allegations of the cross-claim filed against Woolley and his surety with reference to the amount of the subcontract and the amount paid, denies that any damages are due Woolley because of any failure of Radkovich Company to permit Woolley to proceed with his subcontract, and alleges that Woolley failed to complete his said subcontract, and alleges that the Radkovich Company was compelled to furnish labor and materials to the amount of \$7,887.09 to complete Woolley's subcontract.

The answer of Radkovich Company's sureties contains similar denials of the material allegations of Woolley's [125] cross-claim, and in addition sets forth a special defense to the effect that the bond filed by said sureties was not by its terms liable for losses sustained because of breach of contract by Radkovich Company, if any, causing any damages as alleged in Woolley's cross-claim.

It was conceded at the trial that the amount now due Westinghouse is the sum of \$26,952.01 (not including interest¹ claimed on a larger amount), and

¹ See p. 9 transcript, where counsel stipulated as to interest. *Illinois Surety Co. vs. John Davis Co.*, 244 U.S. 376, 381.

after this was agreed upon counsel for Westinghouse retired from further participation in the trial. Further references herein to "the parties" include only the Radkovich Company, Woolley and their respective sureties.

The bulk of the evidence has been offered on the ancillary matters arising by virtue of the subcontract, and relating to an accounting between Radkovich and Woolley. Testimony was given by each of the following witnesses on most of such matters: Wm. Radkovich, president of defendant Wm. Radkovich Company, Inc.; Eugene H. Parks, who was, at all times material to this action, an employee of the Radkovich Company, and the person authorized to deal with subcontractors on behalf of the prime contractor; Ralph E. Ferguson, resident engineer for the United States Engineers on the construction involved herein; and the defendant Edwin B. Woolley. The persons mentioned comprise all of the witnesses, with the exception of the expert witness appointed by the court.

Deduction for Heaters

There is a disagreement between Radkovich Company and Woolley over the amount of the subcontract after the deduction by a change order signed by Col. A. T. W. Moore as Contracting Officer for the Government and Wm. Radkovich for the prime contractor. This change order, dated August 18, 1947, modifies the prime contract in that the government [126] agrees to furnish the electric water heaters and decreases the total amount of the prime

contract in the sum of \$6,100.00. It is the position of counsel for Radkovich Company and its sureties that the total of Woolley's subcontract should be decreased in the same amount, and the case of *U. S. vs. Miller-Davis*, 61 F. S. 89 is cited as authority.

It does not appear from the evidence whether, at the time the change order was made, Woolley was consulted with reference to the amount to be deducted by the government for the heaters,² but there is testimony that when the bid was originally made Woolley overlooked the heaters, and afterwards informed Radkovich that the heaters would cost Woolley \$6,100.00; that Radkovich permitted Woolley to increase his bid in the amount of only \$5,000.00; that before the heaters were deducted from the prime contract, Woolley found he was able to obtain the heaters for \$5,500.00, and accordingly contends that only said sum should be deducted from the amount of his subcontract.

We find nothing in the opinion in the case cited, *U. S. vs. Miller-Davis*, 61 F. S. 89, to indicate that the amount deducted by the government from a prime contract becomes the amount, ipso facto, which the latter may deduct from the subcontract. The findings of the court, set forth in full in the opinion, recite at page 92:

“The defendant Miller-Davis Company is entitled to deduct from amounts otherwise due the plaintiff the savings to the plaintiffs by reason of

² See *Allegheny County Housing Authority vs. Caristo Const. Corp.*, 90 F. Supp. 1007, 1010, sy 4-6.

electrical work and labor eliminated by change orders of the United States.”

The prime contract provides that if changes made by the government cause an increase or decrease of the amount due under the contract, an “equitable” adjustment shall be [127] made and the contract shall be modified in writing accordingly.

It appears, therefore, that by reason of the deduction of the heaters from the material to be furnished by Woolley he saved the sum of \$5,500.00, and that such amount, as to Woolley, is an equitable deduction from the original amount of \$80,000.00.

Using as the total of Woolley’s subcontract the sum of \$74,490.00, and subtracting from this the sum of \$48,914.27 paid Woolley by Radkovich prior to the beginning of this action, and the sum of \$16,562.04 paid by Radkovich to Westinghouse on behalf of Woolley, we have the sum of \$65,476.31 paid to Woolley by Radkovich under the subcontract, leaving the sum of \$9,013.69.

Delays

As we have noted under our analysis of the pleadings filed by Woolley, there is a claim for \$1,149.22 because of Radkovich Company’s failure to allow Woolley to begin work under his contract. The evidence is clear that Woolley received notice to proceed prior to August 28, 1947, and that the contractor had not “poured” any houses in which Woolley could place electrical wiring until October 4, 1947. Woolley kept a crew of men on the job during this time at a total pay roll of \$1,149.22,

it was able only to do some prefabbing at a pay roll cost of \$200, leaving a pay roll for inactive men during this period of \$949.22. It is urged that Woolley could not have begun in any event until after approval of his shop drawings, but it is our view that any delay in approval of Woolley's shop drawings is not attributable [128] to him, but to the changes in the drawings made by the office of the U. S. Engineers.

In addition Woolley alleges he is entitled to the sum of \$9,027.36 for the reason that he would have completed his work under the subcontract by the completion date set thereby, April 15, 1948, had not Radkovich caused said work to be delayed of completion until October 6, 1948. The amount claimed is alleged by Woolley to represent his pay roll during the period above indicated.

The evidence leaves open the question of just what Woolley's pay roll would have been had Radkovich proceeded in such a manner that Woolley might have completed the work under the subcontract by April 15, 1948; there is independent testimony to the effect that Woolley would have needed more men on the job, and thus his pay roll prior to April 15, 1948, would have been greater. Aside from this uncertainty, there is no clear showing regarding the cause of Radkovich's failure to complete the job on April 15, 1948. Radkovich testified he was hampered by the weather; Ferguson indicated that Radkovich caused the delay by improper procedure; the change order dated April 19, 1948, and signed by Radkovich Company, his sureties and by Col. A.

T. W. Moore as contracting officer for the Government, states that it was determined under Article 9 of the prime contract that the delay in performance of Radkovich's contract (as of the date of the change order) was caused by delays in delivery of equipment without fault or negligence of said company. Also, there is independent evidence that Woolley was chargeable with delay after April 15, 1948. [129]

Extras

Woolley claims that at the special instance and request of Radkovich Company he furnished labor and materials for said construction of the reasonable value of \$8,385.53, and that said labor and materials were not included in the subcontract entered into between Woolley and Radkovich, but came under the heading of "extras," as follows: cost of hanging fixtures, \$4,800.00; cost of installing phone circuits, \$133.33; cost of installing chime circuits, \$2,111.80; cost of installing closet lights, \$1,232.54; cost of replacing two units, \$107.86.

Radkovich Company admits that the phone circuits were not included in Woolley's contract, and there is evidence that the same were treated as the subject of a "change order" by the prime contractor and the Government,³ and Radkovich Company has agreed it is obligated to pay Woolley for this work

³ It appeared that this small amount was the cost of a phone circuit which the Engineers on the job told Radkovich they wanted and which he concedes he owes Woolley. No contention was made by any party to the action, including the sureties, with reference to this item.

and material in the sum of \$133.33. The other items, Radkovich Company claims, were called for by the subcontract.

In the subcontract Woolley agreed to perform the obligations of the Radkovich Company as set forth in the prime contract with reference to certain work more particularly referred to in schedules attached to the subcontract; the schedules in turn refer to Section 15-01 through 15-26 of the specifications of the prime contract, and it is further provided that the interpretation and construction of the conditions, etc., of the subcontract shall be subject to the interpretation and construction of the prime contract.

Section 15 of the prime contract is headed "Electrical Work; Interior" and Section 15-01, headed "Scope" provides that the work covered by such section of the specifications

"consists of furnishing all labor, equipment, [130] supplies and materials (except equipment designated to be furnished by the Government) including pilot lamps and performing all operations * * * necessary for the installation of complete interior wiring systems, duct systems, and electric service connections in strict accordance with this section of the specifications and applicable drawings, and subject to the terms and conditions of the contract."

Section 15-02 is headed "Applicable Specifications and Standards" and contains Federal Specification numbers for various electrical materials and fixtures, including heaters, motors, outlets and even friction tape.

No mention is made of electric lighting fixtures or chime specifications.

Section 15-03b provides that within 30 days after the award of the contract and before any materials, etc., are purchased the contractor shall submit to the contracting officer a list of materials to be incorporated in the work, which list shall include such descriptive data, catalog numbers, etc., as may be required by the contracting officer. It is further provided that "any materials, fixtures and equipment listed which are not in accordance with the specification requirements may be rejected." Subsection c recites that if the contractor fails to submit such list the contracting officer will select a complete line of materials, fixtures and equipment which will be furnished by the contractor.

Section 15-04 provides, under the heading of "Government furnished equipment" that the Government will furnish and the contractor will install 100 domestic-type [131] refrigerators and 100 domestic-type ranges, at the locations indicated on the drawings or as directed.

Section 15-19, headed "Fixtures" reads:

"Where type numbers are indicated on the drawings, the Contractor shall furnish and install all lighting fixtures in accordance with the applicable details."

Section 15-20, headed "Signaling system (for quarters)" states:

"The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes as hereinafter

described and where indicated on the drawings * * *.”

then follows a description of the type of chimes, of the push buttons, of the gage of wiring and of the voltage for the transformer required.

It appears that Woolley negotiated his subcontract with Wm. Radkovich personally, and that Radkovich gave Woolley copies of certain portions of the prime contract, to wit, an electrical drawing (Exhibit 5) and the specifications (part of Exhibit B) prior to the time Woolley made his bid. Woolley testified that after studying these specifications and the electrical drawing he computed his bid, and did not allow therein for any of the so-called “extras” because according to such specifications and drawing these items were not to be furnished and installed by him.

About September 30, 1947, a month after Woolley had entered upon the performance of his subcontract, he was given another drawing, Exhibit 11, marked “Revised Electrical Plan,” on which was noted the approval of the U. S. Engineers under date of September 26, 1947, and bearing a notation: [132] “Note: Electrical Fixtures in Accordance With List to Be Submitted for Approval.”

Woolley testified that the Revised Electrical Drawing showed, in addition to the items on the first electrical drawing given him, Exhibit 5, a telephone circuit, a three-way switch for the entry hall lights, two push buttons, a chime circuit, and a pull-chain light in the living room closet; that neither Exhibit 5 nor Exhibit 11 show any type numbers for fixtures,

but show only fixture outlets. Mr. Ferguson testified that the type numbers for lighting fixtures are not shown on the drawings, but in his opinion, from a consideration of the contract, specifications and plans, was that the contractor was required to furnish the fixtures, but the specifications did not tell him what kind of fixtures; he was also of the opinion that the contractor was required to furnish chimes. Mr. Ferguson also noted some of the differences between the original drawing and the Revised Electrical Drawing as testified by Woolley, but was of the opinion that both drawings show a chime circuit.

There is testimony on the part of Mr. Parks indicative of his opinion that "additions" were shown on the Revised Electrical Drawing; Woolley testified that Radovich agreed at one time to pay for the lighting fixtures and for their installation; Radovich contradicted this, although he admitted agreeing to pay for the telephone outlet, and was uncertain whether he agreed to pay for the chimes and closet lights.

The evidence shows that from the date of September 30, 1947, when Woolley received the Revised Electrical Drawing as approved, until the completion of his work, he protested that he was not obligated to furnish the items he contended were outside his contract, and finally, at Radkovich's [133] request he furnished a list of electrical fixtures which were approved by the U. S. Engineers, purchased by Radkovich, and upon demand of Rad-

kovich installed by Woolley as were the chimes, closet lights and other items in controversy.

After the completion of a three-day trial during which much of the testimony of the witnesses mentioned herein referred to the so-called "extras," a transcript was furnished the Court. Later, an expert was selected by the parties, appointed by the Court, and given the contract and its documents, and written interrogatories propounded by counsel with reference to the technical features of the contract, the specifications and drawings. The expert, an architect highly competent in his own field, was unable to be of any assistance to the Court in interpreting the contract, etc., for the reason that he was not familiar with the type of construction involved and felt that most of the questions could best be answered by an expert in the electrical field.

Our own observation of the original electrical drawing, Exhibit 5, and of the Revised Electrical Drawing, Exhibit 11, leads us to agree with Woolley's testimony as to the differences between the two drawings, and it is obvious even to one not trained in reading such drawings that neither of them show any type numbers for lighting fixtures.

We note also that the various other sections in the specifications on Plumbing, Glass, Carpentry and so on give specifications that are extremely detailed, with Federal Specification numbers for such small items as glue, putty, locks and wax for kitchen floors as well as the major items, and that the Electrical Section contains quite detailed speci-

fications and numbers as to most of the electrical [134] items, even friction tape, but makes no mention of lighting fixtures or chime specification numbers.

Counsel for the prime contractor and sureties pointed out that the omission in the specifications regarding the type of fixtures may have been made because the Government intended to have the contractor submit a list of fixtures from which it could choose, but we believe Woolley's testimony that according to trade custom the provision in the contract regarding the submission of a list refers to a list of manufacturer's catalog numbers which the contractor offers as equal to the fixtures described in the Federal Specifications indicated by specification number, and that this list could be furnished only where fixtures were called for and mentioned by type number or described by a Federal Specification number. There is no doubt but that there are thousands of types of lighting fixtures that could have been placed in the outlets shown on the drawings, and it is true that the type of fixtures used could make a difference of thousands of dollars in the cost of electrical work under the contract.

In our study of the contract and its documents we have in mind that the construction covered by the contract was admittedly an experiment on the part of the Government; we feel that those drafting the contract specifications and drawings, as well as those bidding upon the work had little by way of custom and experience to guide them. It is understandable, therefore, that ambiguities and omis-

sions should occur in the contract and its documents and hence in the subcontract. It is possible that those drafting the specifications and drawings for the Government intended to add specifications and type numbers for the lighting fixtures and overlooked doing so, and it is possible that they [135] intended to show chimes and closet lights in the original drawings; it is likewise possible that, there being no standards according to Mr. Ferguson's testimony for lighting fixtures for these concrete-poured houses, that the Government intended to furnish and install the fixtures and chimes, and the addition of these items to the list of Government furnished material was overlooked.

It is our view that the contract and its documents, the specifications and electrical drawing, showed that the contractor was not to furnish and install lighting fixtures, closet lights and telephone circuits; that if said contract, etc., did not similarly disclose that the contractor was not to furnish and install chimes, then at least, as to this matter, there existed ambiguities which should be resolved in favor of the contractor, and as between Radkovich and Woolley, in favor of Woolley.⁴

⁴ See *First Citizens Bank & Trust Co. vs. U.S.*, Ct. Cl., 1948, 76 F. Supp. 250, where the Court of Claims, pursuant to direction of the Senate heard evidence with reference to a claim for extras which claim had not been presented to the Contracting Officer. The plans carried the legend "Ditch where designated". Contractor understood the legend to mean that ditches were to be constructed where the drawing showed a ditch as part of the work to be

See: *U. S. vs. Standard Rice Co., Inc.*, 323 U. S. 106, 111. *Union Paving Co. vs. U. S.* (9 Cir.) 150 F. 2d, 390, 393.

Counsel for Radkovich and sureties argue that under Articles 2 and 15 of the prime contract Woolley is barred from seeking compensation for the work he claims was not included in the subcontract.⁵

Article 2 contains a provision that in case of difference between drawings and specifications the specifications shall govern, and that in case of a discrepancy the matter shall be immediately submitted to the contracting officer, "without whose decision

performed. Government contended legend meant ditches were to be installed where designated by the engineer. Court ruled interpretation should be in favor of the party who had no hand in the preparation of the contract, etc., and that the contractor's interpretation was correct.

While it is not important, in view of the fact that the ambiguity referred to arose in the prime contract in a portion incorporated in the subcontract, the subcontract appears to have been prepared by Radkovich. See *Flotation Systems, Inc., vs. U.S.*, 9 Cir. Calif. 1943, 136 F. 2d 483, 484. Calif. Civil Code 1654.

⁵ See *U. S. vs. Moorman*, 338 U.S. 457; *U.S. vs. Joseph A. Holpuch Co.*, 328 U.S. 234 at p. 239.

While the contract involved in the instant case showed the printed Article 15 deleted and a typed Article 15 substituted, the provisions of which do not appear to be exactly like the Article 15 mentioned in most of the reported cases on this subject as "standard", the cases above cited are authority that no court is justified in disregarding the effect of provisions in contracts for the settlement of disputes.

said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense.”

Article 15 provides that “all disputes concerning questions of fact which may arise under the contract, or [136] disputes which may arise under the specifications * * * shall be decided by the Contracting Officer, who shall reduce his decision to writing * * *” and that the decision of the Contracting Officer may be appealed to the Chief of Engineers, whose written decision shall be final and conclusive upon the parties in absence of a further appeal to the Secretary of War.

We are of the view that any discrepancy disclosed by the drawings could not be determined by a reference to the specifications. The specifications refer to the drawings, and there is nothing in the former to govern the latter.

It appears from the evidence that immediately after Woolley received the Revised Electrical Drawing heretofore mentioned he called upon Mr. Parks and stated that his subcontract did not provide that he furnish the controverted items and that he would not furnish them unless he was paid in addition to the amount of the subcontract; Parks then took Woolley to a Mr. McCumber whose responsibility, according to Parks, was to “take care of this type of matter in submitting drawings and channeling them through the U. S. Engineers to obtain approval.” There, according to the testimony of Parks and Woolley, McCumber stated that Woolley was not recognized in his office, had no standing to make

a protest, and that the matter was to be settled between the contractor and the subcontractor. Later, according to Woolley's testimony, Radkovich told him that it had been ruled that the controverted items were in the contract, and that Woolley was "stuck with it."

We can find no evidence that Radkovich ever presented the dispute to the "Contracting Officer" as that person is described under Article 28 of the contract, Section (b), and we find no evidence of any decision in the matter by either [137] of the two persons who appear in the exhibits as "Contracting Officers" and no evidence that any of the other persons connected with the office of the U. S. Engineers who passed on the dispute was an authorized representative or duly appointed successor of a contracting officer.⁶

We do not decide that absent the special circumstances we have just related it would have been the duty of the subcontractor, rather than the prime contractor, to carry the dispute to the Contracting Officer, etc., as provided by Section 15 of the con-

⁶ See *Yuhasz vs. U.S.*, 7 Cir. 1940, 109 F. 2d 467, 468, sy. 2, cited in *U.S. vs. Goltra*, 312 U.S. 203, note at 209. In the *Yuhasz* case the action of the engineer and inspector was relied upon by the contractor; court held such action did not satisfy provisions of the contract referring to "Contracting Officer".

Also: *U.S. vs. Willis*, 4 Cir. 1947, 164 F. 2d 453, 455. *Continental Casualty Co. vs. U.S.*, 5 Cir. 1940, 113 F. 2d 284, 286, sy 3-4.

tract.⁷ We are of the view that were that burden imposed by the contract upon the subcontractor, the Radkovich Company would, under the conditions presented, be estopped to urge Woolley's failure to comply with such section.

As for the contention of the prime contractor and sureties with reference to Article 2, it is our view that the prime contractor, itself, adjusted the matter, and did so at its own risk and expense.⁸

Replacement of Units

Two buildings collapsed, necessitating replacement by Woolley of units already installed. The weight of the evidence is that this collapse was due to faulty construction of the roof, a portion of the

⁷ See *U.S. vs. Madsen Construction Co.*, 6 Cir. 1943, 139 F. 2d 613, 615, at bottom, where it is indicated subcontractor has duty of appeal, or to request that prime contractor appeal to Contracting Officer. Compare *Allegheny County Housing Authority vs. Caristo Const. Corp.*, 90 F.S. 1007, 1010, holding, in effect, that relationship between prime and subcontractors so far as dealing with Government is analogous to trustee and ceste que trust"; that prime contractor has duty to keep subcontractor fully informed regarding such dealings, where subcontractor is affected.

⁸ We wish expressly to note that our observations in this phase of the case are referable only to the equities between the subcontractor and the prime contractor, and we do not intend to suggest that the contractor may not have a meritorious claim against the Government with reference to the controverted items. See *John A. Johnson & Sons vs. U.S.*, 4 Cir. 1946, 153 F. 2d 534, 542.

work assumed by the prime contractor. Woolley is entitled to recover for this item as claimed, in the sum of \$107.86.

Radkovich's Back Charges

Drury Electric Co. back charge: On or about June 7, 1948, after an interchange of letters between the subcontractor and the prime contractor with regard to the matters in dispute between them, Woolley left the job, claiming Radkovich had breached the subcontract. Radkovich lists as a back charge against Woolley a sum paid to Drury Electric [138] Company, another electrical contractor, while Woolley was off the job. The evidence is not clear that such contractor performed any of Woolley's work. On June 10, 1948, the Radkovich Company wrote Woolley that unless the latter resumed the performance of his subcontract by June 14, 1948, the prime contractor would take over performance thereof. Woolley returned to the job prior to or on June 14. It is our view that this back charge should be disallowed.

Back charges for lighting fixtures, chimes, etc.: Radkovich claims a back charge for certain materials purchased by him and installed by Woolley; such of these as are referable to items we have ruled Woolley was not obligated to furnish should be disallowed. This includes lighting fixture items listed as replacements of items stolen from the job totalling \$18.53, and an item for freight in the sum of \$107.00, and two items totaling \$68.16 listed as replacements for lighting fixtures broken by Woolley's men. There

is no evidence that Woolley or his men were chargeable with any theft or breakage.

Conceded back charges are items in the sum of \$2,213.53 for materials, etc., and \$536 for pay roll.

Liability of Glens Falls Indemnity Company

The Glens Falls Indemnity Company, as we have heretofore mentioned, executed two bonds with E. B. Woolley, the subcontractor, as principal. One, a performance bond contained certain conditions, among them that the obligee, Radkovich Company, should perform its obligations under the subcontract and should notify the surety of any act on the part of the principal which might involve a loss for which the said surety would be responsible.

There are certain sums claimed by Radkovich to be due him from Woolley which might be considered as [139] attributable to failure of performance by Woolley, to wit, the furnishing by Radkovich of certain electrical materials (not included in the converted items) and the hiring and payment by Radkovich of certain electrical workers. These items of Woolley's indebtedness were conceded by Woolley. They were also conceded by the surety, and for that reason we need not inquire into the question of whether Radkovich adhered to the conditions of the performance bond furnished by Woolley.

The payment bond indemnifies the obligee against any failure of Woolley "to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said sub-

contract." No conditions are incorporated into the bond.

While the two bonds were executed at the same time, the subcontract provides for separate bonds, and we are of the opinion that any failure of the principal contractor to observe the conditions of the performance bond may not be urged as a bar to recovery on the payment bond.¹¹

The second affirmative defense of this surety sets forth that the subcontract was, without the consent of the surety, materially altered by Radkovich Company and Woolley in that, among other things, payments were made by said Radkovich Company to Woolley prior to the time that said payments became due under the terms of the contract.

The third affirmative defense is that the subcontract was altered to permit the prime contractor to take over control of said contract and that the Radkovich Company took control of and supervised and directed the purchase of materials and the subcontract work.

The fourth affirmative defense is that the prime contractor prematurely paid the subcontractor, between [140] September 1, 1947, and December 31, 1948, large sums of money in excess of the monies due the subcontractor on account of the subcontract work.

The fifth affirmative defense states that the sub-

¹¹ See *Maryland Casualty Co. vs. Shafer*, 57 Cal. App. 580, 1922; 208 P. 192. *Summerbell vs. Weller*, 110 Cal. App. 406, 294 P. 414. *Lamson Co., Inc., vs. Jones, et al.*, Cal. App., 24 P. 2d 845.

contract was altered so that the said "subcontract was not performed or constructed according to the plans or the specifications referred to in said subcontract * * *."

The Sixth affirmative defense is that the cross-claim fails to state a claim, etc.

The seventh affirmative defense is that the prime contractor ordered the subcontractor to perform work not called for by the subcontract, etc., amounting to large sums of money for which the Radkovich Company refused to pay.

The second affirmative defense and the fourth appear to refer to the same point urged by the surety, namely, that the subcontract was materially altered in that a premature payment was made to the subcontractor; another point urged, though not specifically pleaded unless it is included in the phrase "among other things" in the second affirmative defense, is that the subcontract was altered to change the method and amount of payments due Woolley.⁹

Counsel for the surety have not contended that more than one payment was premature or in excess of the amount due Woolley at the time; they contend that after the so-called premature payment

⁹ We feel, however, that the issue of a change in the method of payment to a lesser amount than was due the subcontractor is sufficiently pleaded in the general allegation, and whether it was or was not pleaded is of no importance in view of Rule 15 (b) F.R.C.P. and the fact that all parties recognized this as an issue. See *U.S. vs. Cunningham*, D.C. 1941, 25 F. 2d 28, 30.

Woolley received less on each payment than was due him at the time.

As to these defenses, the burden is, of course, upon the surety first to show the method of payment provided by the subcontract, and that such method was altered.

The subcontract, Section 3, provides in part:

“* * * The aforementioned consideration shall be paid to the subcontractor upon invoices [141] and vouchers surrendered therefor, in such manner and form as shall be prescribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion affecting the generalities of the reference to the principal contract and the agreements of the subcontractor hereunder to be bound thereby, payments shall be made by the contractor to the subcontractor only in accordance with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the subcontractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of said Article 16.”

Article 16 of the prime contract provides in part:

“Payments to contractor. (a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the **end of each** calendar month or as soon thereafter as practicable, on estimates made and approved by the contracting

icer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payment there shall be retained 10% on the estimated amount [142] until final completion and acceptance of all work * * *."

Counsel at the trial and in their briefs refer to "payments to be made under the prime contract as progress payments," and counsel for Glens Falls Indemnity Company in their reply brief filed July 1, 1950, at page 7, lines 10 to 12 thereof, state that "all estimates were calculated on the basis of the percentage of work completed at a given time. As we understand this statement, it means that if the contractor on a payment date has completed 3% of his work under his contract he should receive an amount which would bring his total compensation as of that date to 3% of the total amount of his contract, except for the 10% provided by the contract to be retained. Counsel for Radkovich and sureties appears to share this view, as shown in paragraph 5, page 7 of his reply brief filed August 11, 1950. Such interpretation does not explain how the phrase in Article 16 "the material delivered on the site and preparatory work done may be taken into consideration" is construed in arriving at the percentage to be paid the contractor.

However, if we give the subcontract the interpretation contended for by counsel for Glens Falls Indemnity Company, that Woolley was to be paid each month a percentage of the total amount of his subcontract based upon the same percentage of his com-

pletion of the total amount of work to be done under his subcontract, we are still unable to determine from the evidence just what amount, on any given payment date, Woolley should have received under the proper payment procedure, and thus are unable to determine that the amount he did receive on each payment date was not the correct amount.

The first estimate, dated September 25, 1947, shows [143] materials listed as having been received on the job site in the total sum of \$9,404.37, with sales tax and freight bringing the total to \$9,885.37; no labor cost is listed. On this estimate, Woolley was paid \$5,000.00.

The next estimate, November 1, 1947, for the month of October, shows the identical materials listed on the previous estimate plus some other materials, and the notation: "materials to date, \$13,111.71" and "labor costs to date, \$3,439.38." The total estimate is in the sum of \$16,551.09. Woolley's pay roll (Exhibit 12) beginning August 28, 1947, to October 29, 1947, inclusive, adds up to \$2,774.17. Woolley testified that from August 28, 1947, to October 1, 1947, his men did no work on the job except prefabbing at a pay roll cost of \$200.00, leaving an inactive pay roll up to October 1 in the sum of \$949.22. Subtracting this sum we have a total of \$1,824.95 for actual labor cost going into the job up to November 1. On the October estimate Woolley testified he was paid \$15,000.00, which is about the amount of the estimate less the retained 10%. However, included in this estimate was material costing about \$9,404.37 for which material he had already

been allowed \$5,000.00 for September plus about \$9,404.37 less 10% for October, and actual labor cost of \$1,735.95 for which he was allowed about \$3,439.38 less 10%.

On the estimate under date of November 24, 1947, we find:

“The following is a statement regarding above job for the month of November, 1947. Rough installations for 23½ houses at \$390.00 per house. Payment due \$9,165.00.”

This estimate does not show any material delivered to the job during that month, and Woolley's pay roll from [144] October 30 to December 4, 1947, totals \$2,771.16. On this estimate Woolley testified he was allowed \$3,000.00.

Regarding the change to the unit method of payment Woolley testified that the November 24th estimate was based upon labor costs of \$390.00 per house for roughed in work, as the rough-in material was already on the job and Woolley had been paid for it, but that Radkovich wanted Woolley to accept \$200.00 per house for labor, and finally Radkovich told Woolley that the Radkovich Company was in financial trouble and Woolley accepted \$3,000.00 on that estimate.

The next estimate is dated January 12, 1948, and is for the month of December, 1947. On this estimate Woolley lists 57 rough installations at \$200.00 each, at \$11,400.00, from which he subtracts \$7,000.00 for 35 units previously billed, or a total of \$4,400.00 for rough installations. Also listed is material delivered on job site for December in the sum of

\$1,642.97, or a total of material and labor of \$6,042.97. Woolley testified he agreed to take only \$3,914.27 on this estimate which he said was the amount he had to have for his pay roll, and which he accepted because Radkovich was in financial difficulty.

Woolley's pay roll for December, 1947, according to his Exhibit 12 was the sum of \$1,678.10. This, added to materials placed on the job, totals \$3,321.07. Woolley listed 35 installations previously billed, yet the previous billing shows 23½ installations.

The next estimate is dated February 12, 1948, and is for the month of January, 1948, and shows a total of 77 rough-in installations with 57 units previously billed subtracted or a total of \$4,000.00; also shown is \$18,798.50 in material delivered on the job, with a total of \$22,798.50. Woolley testified he had the last mentioned [145] sum due him but Radkovich disagreed, and gave him only \$18,000.00. Woolley's pay roll for January was the sum of \$2,837.55.

The next estimate is dated March 10, 1948, and shows 91 units roughed in and 77 previously billed subtracted, or a total of \$2,800.00, with materials delivered on the site in the sum of \$21,999.58. Woolley testified he received nothing on this estimate. Since the checks on the estimates appear to be dated a month or more later than the date of the estimate, we assume that the Westinghouse notice dated April 10, 1948, that Woolley owed the supplier the sum of \$43,514.05 had reached the Radkovich Company and for that reason no payment was made on

such estimate. No further estimates were introduced into evidence.

We note, therefore, that prior to the March 10, 1947, estimate Woolley had furnished to the job according to the shipment list from Westinghouse, \$30,633.64 in material, and according to his pay roll \$9,111.76 worth of work, or a total of \$39,745.40, and he had received from the Radkovich Company the sum of \$48,914.27. (He had paid Westinghouse as of said date the sum of \$9,108.00.)

Woolley testified that on certain of his estimates Mr. Ferguson allowed him an amount greater than that paid him by the Radkovich Company as to such estimates, and counsel for the surety indicates that this is some proof that Woolley was not paid according to his contract. We are not concerned with Radkovich's failure to pay Woolley on the March 10, 1947, estimate, and as for the previous estimates, Mr. Ferguson testified he did not pass on the first estimate; his only testimony which we have found in the transcript with reference to any subsequent estimate except that of March 10, 1947, is that with reference to the February [146] estimate he allowed the full amount of the material stated thereon, \$18,000.00, less 10%. Further, the evidence shows that it was no part of Mr. Ferguson's official duties to pass upon the amount due any subcontractor, and that anything he did along this line was done merely as an accommodation to the contractor. Mr. Parks stated he had nothing to do with the payment of Mr. Woolley; Mr. Radkovich stated he had never read Article 16 of the prime contract, that he had

no way of knowing how much was due Woolley each month other than a slip of paper given him each month by Mr. Ferguson, which was written in pencil on scratch paper, and which Mr. Radkovich did not retain.

While we might be able to figure what percentage of the total amount of the subcontract each estimate represented, there is no evidence that the work covered by the estimate represented the same percentage of the work called for by the subcontract.

We advert to a colloquy between court and one of counsel for the surety at the trial: (tr. p. 60.)

The Court: And these estimates would show the variance between the payments provided for in the contract, is that your theory?

Mr. McCall: Well, they tend to, your Honor. It appears that we have no document before us or evidence showing how much the subcontractor was entitled to, and by these estimates we hope, through this plaintiff and the government engineer and the subcontractor, to show how much of this he was entitled to each month."

And to counsel's examination of Radkovich at page 71: [147]

"Q. Under your system, then, of payments there was no way in the world for Mr. Woolley to calculate how much he was entitled to each month, was there?"

Subsequent to the trial, at a hearing held in January of this year, after spending considerable time and study on the question of payment of the subcontractor, we asked counsel to enlighten us further

on this subject; briefs were filed, but counsel failed to spell out for the Court the matters requested and after our own laborious calculations, part of which we have set forth herein, we are of the opinion that there is "no way in the world" for counsel or the Court to ascertain from the evidence just what amount in any one payment date the subcontractor was entitled to receive; likewise, whether the subcontractor was, or was not, paid according to the terms of the subcontract.¹⁰

The evidence which the surety's counsel contend establishes a premature payment from the prime contractor to the surety relates to the payment, after the first of September 25, 1947, estimate was presented, of the sum of \$4,000.00 to the subcontractor in addition to the \$5,000.00 paid on such estimate. Radkovich testified that Woolley, when he presented said estimate in the sum of \$9,885.37 stated that he must have \$9,000.00 that day or he could not go on with the subcontract; also that Woolley had materials in that amount on the job site but some of them were locked up, and consequently the Government allowed Woolley only \$5,000.00 on this estimate; that he, Radkovich loaned Woolley the sum of \$4,000.00, and Woolley gave Radkovich the sum of

¹⁰ It may be of some significance that throughout the correspondence in the Exhibits, and especially in the letter to Radkovich Co. of April 29, 1948, where Woolley's counsel reviewed the matters contended by Woolley to be breaches of the subcontract, no mention was made of any failure of the Radkovich Company to pay Woolley according to the subcontract.

\$500.00 interest on the loan. While Radkovich used the word "advance" once or twice in referring to the matter, and once stated that he didn't loan the money to [148] Woolley, his testimony on the whole inclines us to the view that Radkovich considered the transaction as a loan. It was agreed between the two men that the prime contractor should repay itself from a subsequent payment due Woolley, and this was done; Woolley testified the transaction was arranged as a loan.

Counsel for Radkovich and sureties suggests that the \$5,000.00 may have been a payment on the estimate, which showed over \$9,000.00 worth of material on the job site; in reply counsel for the surety Glens Falls Indemnity Company suggests that if this is so, then when Radkovich deducted the \$5,000.00 from the later estimate, he underpaid Woolley as to that estimate. Aside from the testimony of Woolley and Radkovich that the payment was a loan, we would still be unable to agree with counsel for the surety that a premature payment has been established; a finding of a payment on the subcontract in excess of the amount due must be predicated upon a finding as to what amount was due, and such a finding is impossible from the evidence.

Third affirmative defense: We find no evidence that the prime contractor took "control" of the subcontract; and any supervision it exercised over the subcontractor was sanctioned by the contract.

Fifth affirmative defense: Any alteration of the subcontract so that the same was not performed

according to the plans and specifications was the subject of a written change order with the exception of the addition of the \$133.33 telephone circuit which seems to have been constructed pursuant to an oral order of the U. S. Engineers on the job, agreed upon by Radkovich and not complained of by the surety. We find no merit in this defense.

Sixth affirmative defense: The cross-claim states [149] a claim against said surety upon which relief can be granted.

Seventh affirmative defense: This defense is ambiguous on the face of the pleading, inasmuch as it is not alleged that Woolley furnished any extra and additional materials not called for by the subcontract. The mere fact that the prime contractor ordered the subcontractor to furnish such additional materials is no ground for release of the surety.

Liability of Radkovich and His Sureties

Liability of Radkovich

The payment bond of the Radkovich sureties, is, as required by the Miller Act (40 U.S.C.A., Section 270a (2)) a bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract."

Woolley's cross-claim against Radkovich and sureties is brought under the Miller Act, and the liability of such sureties must be predicated upon the provisions of the bond given pursuant to such Act.

The bond recites that "the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work pro-

vided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Sureties being hereby waived * * *.”

As we have mentioned earlier herein, there is no contention by anyone that any of the labor or materials supplied by Woolley (except the small item of \$133.33 for phone circuits with which none of the parties is concerned) were supplied pursuant to “any and all duly authorized modifications of said (prime) contract” and no one contends that any duly authorized modification of the prime contract [150] provided for any labor or materials to be supplied by Woolley over and above the amount of his subcontract, and no one contends there were any duly authorized modifications of said (prime) contract except the change orders attached to said prime contract, having to do with the deletion for the heaters and the extension of time of performance.

It is obvious therefore that if Woolley can recover under the Miller Act from the Radkovich sureties, it must appear that the amounts he seeks represent “labor and material” supplied “in the prosecution of the work provided for in said (prime) contract.”

In his answer to the complaint filed by Westinghouse Woolley denies that all the materials furnished him by Westinghouse were used in the performance of his subcontract with the defendant Radkovich Company, stating that a portion of said materials were used by him for extra work or additions to the subcontract at the request of Radkovich Company, but he admits that all of the Westinghouse mate-

ials actually went into "said work and the structures erected."

In his cross-claim against Radkovich and sureties Woolley does not at any point make a clear and definite allegation that the labor and materials he uses for over and above the amount of his subcontract were "supplied in the prosecution of the work provided for in said (prime) contract, or any authorized modification thereof."

In his allegation with reference to the labor and materials furnished under his subcontract Woolley has mentioned that these were furnished to be used and were actually used in and about the construction of "said improvements."

In his allegation with reference to the labor and materials used in the so-called "extras" he states these [151] were "furnished to be used and were actually used in and about the erection and construction of said improvements" and were in addition to the labor and materials furnished under his subcontract.

In his allegation where he lumps together, as labor and materials furnished at the special instance and request of Radkovich Company and upon its promise to pay the reasonable value thereof, the amounts referable to the subcontract, the so-called "extras" or controverted items, and the sums referable to Radkovich's failure to allow him to proceed with his subcontract, Woolley states these were "furnished to be used and were actually used in the performance of said work of improvement and in con-

nection with the performance of said prime contract.”

On the other hand, Radkovich Company in its answer to Woolley’s cross-claim admits that Woolley furnished certain labor and materials provided for by his subcontract and further alleges that any labor and material for which Woolley seeks recovery as additional labor and materials were in fact “provided to be furnished by said cross-complainant as subcontractor under the terms and conditions of the subcontract and the specifications of the principal contract expressly made a part of the subcontract.”

In their answer to the Westinghouse complaint the Radkovich sureties deny for lack of information the allegations regarding the Westinghouse materials being supplied for use and used in the prosecution of the work provided for in said (prime) contract, but at the trial counsel for said sureties conceded they had no defense to the claim of Westinghouse; this implies admission that all the Westinghouse materials were supplied in the prosecution of the work provided for in said (prime) contract, according to the terms [152] of the bond.

In their answer to Woolley’s cross-claim the Radkovich sureties likewise for lack of information deny all Woolley’s allegations regarding the supplying of materials and labor under and in addition to his subcontract and set up a special defense that their bond is not liable by its terms for any loss sustained because of a breach of contract by Radkovich Company causing delays and that if Woolley sustained

any damages thereby the same are without the terms of the bond.

Whatever we may glean from a consideration of the complicated pleadings in this case the facts remain that the same was tried on the theory that Woolley contends he supplied all the labor and materials called for in his subcontract and in addition he supplied labor and materials not called for in the subcontract or in the prime contract, and that all such labor and materials were used in the construction of the 100 Le Torneau houses at Muroc for the Government; also that by reason of Radkovich's not having ready the construction into which Woolley could place his work after he was ordered to begin performance on his subcontract he was delayed at the beginning thereof and obliged to pay for inactive labor kept on the job, and that by similar failures of Radkovich Company he was delayed in the prosecution of his subcontract to completion.

The case was likewise tried on the theory that Radkovich Company contends all the labor and materials supplied by Woolley were supplied in the prosecution of the work provided for in the prime contract and thus in the subcontract, and that any delay occasioned Woolley was without the fault of Radkovich.

The case was also tried on the theory that the Radkovich sureties contend they are not liable for any [153] damages for delay referable to a breach of the subcontract by the prime contractor.

We have previously concluded herein that Woolley has made proof of labor costs entailed and

damages suffered by reason of the failure of Radkovich to allow him to begin the prosecution of his subcontract, and that Woolley has not made proof of labor costs entailed or damages suffered by reason of any failure of Radkovich to allow him to proceed with the completion of his subcontract, nor has he made proof that any failure in this regard was any fault of Radkovich.

We have also concluded that Woolley has made proof that he supplied certain labor and materials which the prime contractor was not obligated under the prime contract to furnish and which the subcontractor was not obligated under the subcontract to furnish, and that these labor and materials were furnished on demand of Radkovich, and used in the 100 houses constructed by the Radkovich Company for the United States.

We must now endeavor to conclude whether, under the Miller Act, Woolley is entitled to recover herein; if not, whether he can obtain judgment against the prime contractor in this Court by virtue of the laws of the State of California, in the absence of diversity of citizenship, no diversity having been pleaded or shown.

(1) Did the placing of Woolley's men on the job pursuant to notice given him by the prime contractor to proceed, and the keeping of these men on the job in readiness to begin performance amount to "supplying labor and material in the prosecution of the work provided for in said (prime) contract"?

(2) Did the installation by Woolley of the con-

controverted items amount to "supplying labor and material in the prosecution of the work provided for a said (prime) contract"?

We have already set forth the facts which are relevant to the first conclusion; we feel that a more detailed review of the evidence as to relations between Radkovich and Woolley prior to the installation by the latter of the controverted items will be helpful.

In September, 1947, and in March, April, May and June of 1948 there was correspondence between the Radkovich Company and Woolley, or Woolley's counsel which alluded to the furnishing and installing of the closet lights, lighting fixtures and chimes; a letter from Radkovich to Woolley dated May 18, 1948, enclosed a letter from the Chief of the Operations Division of the United States Engineer's Office wherein Radkovich was told that unless the proposed schedule of electrical fixtures was received by June 1, the Contracting Officer would select fixtures to be furnished by the contractor without change in the contract price.

Sometime between June 1, 1948, and June 7, 1948, a meeting was had at which Radkovich of the Radkovich Company, Woolley and their respective counsel were present. Mr. Decker, who appears here as one of the counsel for Woolley's surety, attended the meeting as did a representative of said surety. The evidence is not very clear as to what transpired at the meeting, but according to Woolley and Radkovich, the dispute between them was discussed; Radkovich stated Woolley was expected to supply

the lighting fixtures, etc., and Woolley refused to furnish or install the same.

On June 4, 1948, counsel for Woolley wrote the Radkovich Company that its repeated refusal to carry out its obligations under the subcontract made it impossible for Woolley to carry on further; that Woolley must stand on his [155] legal rights and was removing his men and equipment from the job on June 7, 1948.

On or about June 7, 1948, Woolley and his men withdrew from the job; on June 10, 1948, Radkovich Company wrote Woolley that he was in default with reference to the performance of his subcontract, and that unless he should resume performance under the subcontract on or before June 14, 1948, the prime contractor would take over the completion of the work under the subcontract and reserve all rights and remedies against Woolley and his sureties for damages.

On June 10 or 11, 1948, Radkovich Company caused another electrical contractor, the Drury Electric Company, to place its men at the job-site; on June 12 a letter was sent by Woolley to Radkovich Company stating, in part:

“* * * I shall remove work under subcontract * * * on or before * * * June 14, 1948.”

The letter further provided that the resumption of work should be without prejudice to any rights or remedies which Woolley might have against Radkovich, particularly those matters referred to in the letters of April 29 and May 8 from Woolley's coun-

sel, and should not be construed as a waiver of any of Woolley's rights or remedies.

Woolley then resumed work on or before June 14, 1948.

After Woolley returned to the job, there was still more correspondence between the said two parties, the last letter referring to the controverted items being dated July 19, 1948. In all their written communications neither Radkovich nor Woolley departed from their respective positions—Woolley insisting that he was not obligated to furnish and install the items, but would do so as “extras” and would look to Radkovich for compensation over the amount of his subcontract; Radkovich Company insisting that Woolley was obligated in this [156] regard and would receive no extra compensation for the furnishing and installing of said items.

We are satisfied that if Woolley ever understood that Radkovich had agreed to compensate him in addition to the sum of his subcontract, such understanding was of short duration, and was dispelled by correspondence before the fixtures, etc., were installed by Woolley.

In short, the situation summed up was this; neither the prime contract nor the subcontract provided for these controverted items; no dispute concerning them was presented to or settled by the Contracting Officer; no change order as provided for in the contract was issued for their inclusion in the contract; the prime contractor ordered the subcontractor to furnish them or be subject to penalties for non-performance of his contract; the sub-

contractor furnished them contending they were not covered by the prime contract nor by any change order under the contract, nor by the subcontract, and informing the prime contractor he would look to it for compensation for these items.

Counsel for Radkovich Company and sureties have cited *L. P. Friestedt Co. et al v. U. S. Fireproofing Co. et al*, 10 Cir. 1942, 125 F.2d 1010. There the prime contractor delayed in completing his preliminary work and as a result the subcontractor was compelled to hoist all steel by hand and to rent additional equipment. The Court observed that, stripped of all technicality, the subcontractor sought to recover damages for breach of an implied covenant of the prime contractor against unreasonable delay preventing the subcontractor from proceeding with their work. Said the Court: (p. 1011)

“The bond . . . requires payment not only of work and materials specifically mentioned in [157] the contract, but also those items which the parties necessarily and reasonably contemplated as being required for the performance of the contract.”

After citing *Brogan v. National Surety Co.*, 246 U. S. 257, where recovery on the bond was allowed a person who furnished groceries in a remote area where the contractor boarded his men; *Title Guaranty & Trust Company v. Crane Co.*, 219 U. S. 24, where recovery was allowed for cartage and towage of materials and for drawings and patterns used by the contractor; and *U. S. F. & G. Co. v. U. S.*, 231 U. S. 237, where recovery was allowed for labor at a quarry operated fifty miles away from the site

of the construction, and *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, where recovery was allowed for the expense of loading and freighting equipment used by the contractor, the Court observed: (p. 1012)

“* * * In each of these cases the Act was liberally construed to protect those furnishing labor and material that went into the construction covered by the contract. It is to be noted, however, that in every instance recovery was allowed on the bond because the outlays for which recovery was sought were necessary for the performance of the contract and were within the contemplation of the parties to the contract.” (Emphasis supplied)

Continuing, we find: (p. 1012)

“* * * The claim for which the parties seek recovery here did not arise under the contract, but outside of the contract. What was done was not required by any of the terms of the contract, but became necessary because of an alleged breach of [158] the contract because a contractor violated one of the terms of the contract, in other words, committed a wrong against the parties resulting in loss or damage to them.

“* * * We fail to discern anything in the Heard Act evidencing a Congressional intent to protect one under the bond required by the Act against damages for breach of contract.”

In *Continental Casualty Co. v. Schaefer*, 9 Cir. 1949, 173 F.2d 5, the prime contractor was required under the subcontract to perform certain excava-

tions and furnish certain materials in accordance with the specifications and in proper time for the performance of the subcontract by the subcontractor. The prime contractor failed to make the excavations in the proper manner, and the subcontractor was obliged to do such work in order to proceed with its subcontract; other breaches by the prime contractor of the same order hindered and delayed the subcontractor; it appeared that the prime contractor had induced the subcontractor, by agreeing orally to compensate him, to continue performance after the breaches and to do some of the work the prime contractor was obligated under the prime contract to do. The Court found that the prime contractor had waived the provision in the subcontract requiring an agreement for additional work to be in writing by acting on oral notices; and that the measure of the subcontractor's recovery against the surety and prime contractor was reasonable value of the work and materials furnished plus overhead and profit.

The surety there contended that the subcontractor's action was one for damages for breach of contract and that it should not be liable for such damages, citing *U. S. v. Maryland Casualty Co.*, 5 Cir., 147 F.2d 423; *L. P. Friestedt [159] Co. v. U. S. Fireproofing Co.*, 10 Cir., 125 F.2d 1010. The Court of Appeals was of the view that the case before it was distinguishable from the cited cases because in the latter there was no agreement by the general contractor or the United States to pay any additional amount for the extra work done. The Court

also noted that in the Friestedt case it was mentioned that the subcontractor made no claim that they furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract, while in the case before it the subcontractor, by the performance of the new agreement, furnished labor and materials agreed to be supplied by the prime contractor under the prime contract and "hence within the terms of the Miller Act and the bond."

In *United States v. John A. Johnson & Sons*, 1945, 65 F.S. 514, District Judge William C. Coleman, D. C. Maryland, considered problems of pleading, jurisdiction, damages for delay and liability of the surety under the Miller Act. It appeared that as to one part of the case the court mentioned there was a natural inference that the Government had made an error in specifying an inferior grade of brick for the exterior work, and upon recognizing the error after the masonry work was well advanced, attempted to cover up its error by relying upon its right to reject any and all materials under the contract, and required the contractor to furnish additional bricks; the contractor, who was also charged with the duty to see that the bricks met the specifications, did not test them, but required the subcontractor to furnish other bricks. The Court, at page 524 of its opinion, analyzed the situation:

"What really happened was what doubtless often occurs in building transactions, i. e. the [160] contractor did not trouble to determine whether the bricks really met the specifications but left this to

the owner (the Government) since it was the latter that he had to satisfy;* * *”

The Court then found that the bricks did meet the specifications, that the project engineer had been negligent not only in his failure to determine at the outset the true quality of the bricks, but in his unwillingness to recognize that the specifications were in error and that a change in the quality of the brick was called for; that the question of the Government's liability to the prime contractor was not before it, and whatever the Government's defense might be, the subcontractor was entitled to recover from the prime contractor and its sureties.

As to another set of facts considered in the same opinion, the subcontractor interposed a counterclaim that it had been damaged by reason of the prime contractor's failure to provide temporary construction necessary to the completion by the subcontractor on time of his contract, and that the prime contractor had failed to provide access to the site, all of which delayed the subcontractor. The general contractor and the surety filed a motion to dismiss as to such counterclaim on the ground that it was one for damages against the prime contractor for breach of contract, and could be cognizable in Federal Court only where diversity of citizenship appeared. The Court at page 527 discussed the possibility that the subcontractor might have a meritorious claim against the general contractor in a State court, but questioned the prosecution of the claim in the proceeding before it.

At page 528 the Court observed: [161]

“... it is clear that the obligation by which the general contractor and surety are bound to subcontractors excludes payment for everything except labor and material actually called for by the contract between the general contractor and the Government, which is made a part of the contract between the general contractor and the subcontractor.” (Emphasis supplied.)

At page 531 the Court adverted to the fact that in another part of the proceeding it had allowed the subcontractor to recover upon a counterclaim against the general contractor for extra material and labor furnished, (improper rejection of bricks) but distinguished this by saying that though it was a breach of contract by the general contractor,

“... the performance by the subcontractor, upon which he based his right to recovery, was performance such as was expressly required of him by the contract for which, and only for which, he could recover under the payment bond which we have heretofore analyzed; whereas in the present case, there is the distinction that the subcontractor has not supplied labor and materials which he was, in fact, never required to supply by the terms of the contract.” (Emphasis supplied.)

The Court observed, at page 531, that while it might be well that in an ordinary suit the Rules could extend the scope of the action to permit the consolidation of all the claims, it was unwilling to entertain the same in a Miller Act proceeding, and

at page 532 of the opinion ruled that the counterclaim should be dismissed. [162]

The opinion of the Court of Appeals of the Fourth Circuit on the appeal is reported at 153 F.2d 534. (Cer. den. 328 U. S. 865.) The dismissal of the subcontractor's counterclaim is not discussed, but the opinion of the lower court with reference to the other phases of the case is liberally quoted from and approved.

In *Great Lakes Construction Co. v. Republic Creosoting Co.*, 8 Cir. 1943, 139 F.2d 456, the prime contractor failed in its obligation to have a site ready for the work of the flooring contractor; the subcontractor refused to proceed unless the prime contractor would compensate it for increased costs resulting from delay; the prime contractor took over and did part of the work under the subcontract; after a conference at which each party asserted the other had breached the subcontract, the subcontractor went ahead with the work each party reserving his rights; the lower court gave judgment against the prime contractor and surety on quantum meruit for the reasonable value of the work and material at the time it was finished, with interest from the date of filing of the action, holding that the conduct of the parties after the material breach by the prime contractor constituted an abandonment by the parties of the subcontract, and the subcontractor, having furnished material and labor which was accepted and received by the prime contractor and used and employed in the construction, was entitled to recover.

In *Union Paving Company v. U. S.*, for the Use of Soule Steel Co., 9 Cir. 1945, 150 F.2d 390, the erection of falsework was admittedly necessary under the prime contract for the construction of piers and abutments; the prime contractor sought to charge the subcontractor with the cost of such work and the Court ruled that under the subcontract (which was ambiguous and drawn by the prime contractor) and [163] by virtue of the construction placed upon it by the parties, the prime contractor should bear the cost of the work; it was contended, however, that the subcontractor should have rescinded when it learned the prime contractor sought to charge it with the cost of the work. The Court ruled that the subcontractor was not obliged to rescind, but could, as it did, stand on the subcontract, and, being at all times ready and able to perform, keep it alive for the benefit of both parties. (Citing *McConnell v. Corona City Water Co.*, 49 Cal. 60, 85 P. 929, 8 L. R. A., N.S., 1171; *Sobelman v. Maier*, 203 Cal. 1, 262 P. 1087; *Dyer Bros. v. Golden West Iron Works v. Central Iron Works*, 2 Cal. App. 202, 237 P. 386, and other California cases.) Judgment for the subcontractor against the prime contractor and sureties was affirmed.

In *Great Lakes Construction Co. v. Republic Freezing Co.*, 8 Cir. 1943, 139 F.2d 456, the Court, citing *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 248 U.S. 334, ruled that a contract to construct the flooring in a building implied timely provision of the situs for its location, and that the failure of the prime contractor to have the building

ready for flooring work at such time as to have permitted the flooring subcontractor to perform the subcontract within its completion date justified the subcontractor's refusal to proceed; that when the prime contractor undertook to do the work itself, there was an abandonment of the subcontract and the acceptance of work and materials furnished by the subcontractor when it resumed work after a portion was done by the prime contractor entitled the subcontractor to recover against the bond on quantum meruit. In the case last cited the parties disagreed as to who had breached the contract, but the subcontractor finished the work, each party reserving its rights until an adjudication. [164]

We are of the view that nothing occurred at any time pertinent to this action which made it legally obligatory upon Woolley to pull off the job and remain until he received a written agreement for additional compensation; and we are of the view that the circumstances under which he left the job and returned resulted in no abandonment of the subcontract by either party, and in no change of their respective positions with reference to any controversy between them.

We have noted carefully the suggestion of Woolley's counsel that the "damages for delay" may be recovered under the heading of "labor and materials" supplied within the meaning of the Miller Act. It is true that the labor was delivered in good faith to the job-site¹² by the subcontractor; it was

¹² See: *Purity Paint vs. Aetna Casualty & Surety Co.*, 56 F. S. 431; *Glassell-Taylor Co. vs. Magnolia Petroleum Co.*, 5 Cir. 153 F. 2d 527.

not "used" in the houses to be constructed under the prime contract, but actual use has been held not to be conclusive; it was not incorporated into the substance of the houses to be constructed under the prime contract, but such incorporation¹³ likewise has not been held conclusive; it was "necessary" in that the first portion of the electrical work had to be done between the inner and outer forms set up for the pouring of concrete by the prime contractor; it is also in evidence that the site was so located as to make it difficult to secure labor, and thus the retention of Woolley's men on the job in readiness to proceed as soon as the inner form of one of the houses was erected was required in order that the work under the prime contract could continue without delay.

These circumstances provide weight against the argument of the Radkovich sureties, but not sufficient to balance that of the reported decisions from which we have quoted at some length herein.

We therefore conclude that Woolley can not recover [165] under the Miller Act for the portion of his claim having to do with the failure of Radkovich Company to have the construction in such condition that Woolley could proceed when notified so to do.

Cases decided by the California courts provide ample authority that when Radkovich notified Wool-

¹³ Title Guaranty & Trust Co. vs. Crane Co., 219 U.S. 24, 34; U. S. Fidelity Co. vs. Bartlett, 231 U.S. 237.

ley to proceed, the former was charged with the duty to have the construction ready for commencement of Woolley's subcontract; the failure so to do constituted a breach of the subcontract; Woolley had various remedies under State law, one of which was to continue the subcontract alive for the benefit of both parties and sue for damages for the breach.¹⁵

While Woolley has not separately stated nor specially pleaded a cause of action against Radkovich under the State law, his answer to the cross-claim of the Radkovich Company and its sureties, the last paragraph and the prayer thereof, is susceptible of such construction;¹⁷ the state of the pleadings before us is not the same with reference to the various counterclaims as that discussed in the Johnson case (65 F.S. 514); the manner in which the issues were framed, we believe, justifies our taking jurisdiction in the absence of diversity of citizenship, and it is certain that the complexities of the case have occasioned too much labor of counsel and the Court for us to refuse, at this date, the consideration of ancillary matters or the complete adjudication of interrelated matters on over-technical

¹⁵ *Alder vs. Drudis*, 30 Cal. 2d 195; *Gray vs. Bekins*, 186 Cal. 389, 199 P. 767, 769 sy 4; *Remy vs. Olds, et al*, 88 Cal. 537, 26 P. 355, 356, sy 3; *Steel Tank & Pipe Co. of Calif. vs. Pac. Fire, etc.*, 69 Cal. App. 225, 230 P. 978, 980.

¹⁷ After trial the judgment must grant relief to which plaintiff's case as presented entitles them." *U. S. vs. Zara*, 146 F. 2, 606, 609; F.R.C.P. 54 c.

grounds based upon niceties of pleading.¹⁶

We conclude that Woolley can recover herein against Radkovich Company for damages for breach of contract, consisting of Radkovich Company's failure to have its work ready for Woolley to begin the performance of his subcontract. [166]

With particular reference to Woolley's claim for installing the controverted items, counsel for the prime contractor and sureties cite *United States v. Davidson*, 71 F.S. 401, 408, and intimate that since the Government did not allow the items as "extras" to Radkovich and Radkovich has never received any extra compensation for the same, Woolley can not recover. The opinion in this case does nothing to uphold the theory on which it is cited; the parties stipulated the contractor and sureties were liable on many items similar to those in dispute here; as to some not shown on the plans, the District Court allowed the subcontractors judgment in full against the subcontractor and against the bonding company for the same amounts less profit and in some instances, less overhead; as to other items the Court found the prime contractor had appealed from an adverse decision of the contracting officer and as to these items disallowed them, subject to allowance if the appeal were sustained.

Counsel have also cited *U. S. v. Henke*, 8 Cir. 1946, 157 F.2d 13, affirming a decision reported at

¹⁶ See: *Lesnik vs. Public Industrials Corp.* 2 Cir. 1944, 144 F. 2d 968; *U. S. vs. Skilken*, 53 F. S. 14, sy 6-8; *U. S. vs. American Surety Co.* 2 Cir. 142 F. 2d 726, sy 2.

67 F.S. 123, and this citation seems to be given especially toward the theory that as the subcontract provides for orders in writing for extras from the prime contractor based upon the prime contract provision for orders in writing from the Contracting Officer for same, Woolley could not recover in the absence of such written order for the controverted items. The small item of \$144.88, which the lower court construed under Missouri law to represent an "extra" which required a written agreement for compensation, was actually for the cost of work occasioned by the failure of the prime contractor to prepare properly water tables on which the subcontractor was to place some of his work. The lower court also cited Missouri law to the effect that the subcontractor should [167] have refused to proceed on discovering the defective material until the prime contractor cured the defect or agreed to compensate the subcontractor. This case is of no assistance.

As between the Radkovich Company and Woolley, we think the situation might be described by paraphrasing some of the language used by the Court of Appeals, 4 Cir., speaking through Circuit Judge Soper in the opinion reported at 153 F.2d 35, 45, sy 12, *Ross Engineering Co. v. Pace*:

"The situation is akin to that which occurs when one accepts goods or services from another who expects payment for them. It is urged upon us that no intention to pay for the (controverted items) can be attributed to (Radkovich) in this case in the face of its vigorous denial of all liability . . .

(and in the face of Woolley's failure to obtain a written order from Radkovich for compensation as an extra). But this attitude rests on the contention (that the controverted items were provided for in the prime contract) and since this view is no longer tenable in the light of (our conclusion), the defendant is forced into the field of quasi contracts where the rule is that, irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense, for which it equitably ought to pay. It has been held in a variety of circumstances that when such a situation occurs, a contract to pay is implied in law." (Citing Williston on Contracts, Revised Edition, Vol. 1, Section 3, G. T. Fogle & Co. v. U. S., 4 Cir., 135 F.2d 117, 120, [168] Restatement, Contracts, Section 5.)

See, also, *Lazzarevich v. Lazzarevich*, 200 P.2d 49, (Cal. App.) discussion at page 57, sy 14-15.

We think that Woolley installed the controverted items under circumstances and conditions entirely outside the prime contract or the subcontract, and under circumstances and conditions giving rise to a duty on the part of Radkovich to compensate him for the amount claimed.

Regarding the liability of the sureties for the amount of these controverted items, we are frank to say that this problem has caused us some concern. Having found that Woolley installed these items under the contention, which we have concluded is correct, that they were not included in the prime contract or any portion thereof or modi-

fication thereof as labor or materials to be supplied by the prime contractor, can we now say that they were labor or materials supplied in the prosecution of the work provided for in said contract or any authorized modification thereof? Our concern, which is perhaps undue, arises because of the language found in some of the cases from which we have quoted, and the problem is not solved by reference to other cases cited in our notes herein where an attempt is made to give a general definition of what the bond protects.¹⁸

This difficulty has apparently not been shared by counsel for the surety who has not raised the question. Had they done so, we do not know, of course, what evidence might have been offered to combat it. In view of the weight of authority enjoining a liberal construction in favor of those for whose

¹⁸ An opinion of a Special Master, adopted as the opinion of Judge Kerrigan of our Ninth Circuit is reported as *U. S. For the Use of U. S. Rubber Co. et al, vs. Ambursen Dam Co., et al*, 3 F. S. 548. It contains a full discussion and comparison of many important cases decided with reference to the coverage of the statute prior to 1933. It was stated by Judge Kerrigan:

“Instead of endeavoring to lay down broad rules of classification, the method adopted by the special master in considering the items (constituting ‘labor and materials’) was to attempt so far as possible, a ‘matching’ of cases, and where the cases are not in agreement to follow the more liberal rules, as indicated by the Supreme Court of the United States. It seems just to do this.”

See *Brogan vs. National Surety Co.*, 246 U.S. 257, 262.

benefit the Miller Act is passed, we shall not pursue the matter further.

Accordingly, we conclude that the Radkovich sureties are liable under the Miller Act for the amount claimed by Woolley for [169] installing the controverted items, less any amount included in his claim by reason of profit.

One half the costs should be borne by Woolley and his surety and the other half by Radkovich Company and its sureties.

Dated this 26th day of September, 1951.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed Sept. 26, 1951. [170]

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's Calendar, September 26, 1951.

It is Ordered: Counsel for Wm. Radkovich Company and its sureties will prepare and submit, in conformity with the rules of this Court, within 15 days from date hereof, proposed Findings, Conclusions and Judgment in accordance with the Memorandum of Conclusions this day filed herein.

Copies to counsel.

[Endorsed]: Filed Sept. 26, 1951. [177]

[Title of District Court and Cause.]

MEMORANDUM RE PROPOSED FINDINGS,
CONCLUSIONS AND JUDGMENT AND
OBJECTIONS THERETO.

Judge Weinberger's calendar, February 7, 1952.

Since the Court rendered its Memorandum of Concluisions herein and ordered counsel for Wm. Radkovich Company and sureties to prepare and submit proposed findings, conclusions and judgment in conformity with said memorandum, counsel for the various parties hereto have submitted to the Court the several proposed forms of findings, conclusions and judgment, together with objections, comment and suggestions in the form of documents and letters all of which are attached to this memorandum.

On January 8, 1952 the matter of settlement of the findings, conclusions and judgment was ready for the Court's attention, and the Court was of the opinion that such settlement could proceed more advantageously at a hearing in open Court, but the heavy calendar of this Division of the Southern District has precluded a hearing.

Inasmuch as some of the proposed findings, etc., as well as the objections are not in such form as to be readily subject to a formal order granting or denying the [179] same, we make this informal memorandum so that counsel may be apprised of our views.

Referring to Objection I of objections submitted

y counsel for Woolley and counsel for his Surety, wherein they urge that a finding be added to finding X to the effect that the faithful performance bond and the payment bond were written at the same time, and for only one premium, we are in agreement with Mr. McPharlin's comment in his letter of December 14, 1951. Further, since counsel for Glens Falls Indemnity Co. has not requested any finding which will point to any violation of the terms of the performance bond as distinguished from the terms of the payment bond, we fail to see the materiality of this additional finding.

Objection II: Counsel have requested an amendment to finding XIII which shall read that Woolley completed the subcontract on the 6th day of October, 1948. The evidence is not clear as to when Woolley completed the work of the subcontract as distinguished from the additional work, and we have included a finding with reference to the completion of all the work by Woolley at the end of finding XVI. We have omitted from this finding Mr. McPharlin's reference to Woolley not sustaining damage "due to any other delay" than that of Radkovich, as we do not recall any delay other than that caused by Radkovich being in issue.

Objection III: The matters covered in this objection are more fully explained in Mr. Benedict's letters of November 7, 1951 and January 8, 1952. We have re-examined the pay-roll records of Woolley in evidence and find that subsistence and transportation paid together with wages, etc., justifies a finding that the cost per man-hour was \$4.00. We

agree with Mr. McPharlin that said additional work was [180] not provided for in the contracts, and have used words which we feel will convey the meaning that while the additional work actually went into the buildings which were the subject of the contract, the additional work itself was not covered by the contract.

Objection IV: While it was alleged in Woolley's third cause of action that he received notice to commence work under the subcontract on September 1, 1947, etc. the Court's memorandum at page 6, line 20, states that Woolley received notice to proceed prior to August 28, 1947 and without re-checking the evidence, it is our recollection that he was ready, etc. on and after August 28, to proceed. With reference to the breach of contract, this seems to be more in the nature of a conclusion of law, and as the finding sets forth the facts which constitute the breach, we believe the language we have used in our adaptation of Mr. Benedict's proposed finding to be sufficient.

Objection V: While we feel that Glens Falls is entitled to a finding regarding the facts as to the payment it maintains was premature, such finding should be in accord with the Court's view of the evidence as expressed in our memorandum. The best evidence is the testimony of Ferguson, himself, and our memorandum p. 24, line 29 states the latter testified he did not pass on Woolley's first estimate. Further, since no such duty was imposed on the Resident Engineer, we see no reason to men-

tion Ferguson as such in connection with Woolley's estimate.

Regarding the proposed finding on the second estimate, we see no materiality in adding such a finding. We made mention of this estimate in reviewing all of Woolley's estimates to ascertain if we could find any basis for deciding what was due Woolley and whether he was or [181] was not paid such sum. Inclusion of this estimate, which was not put in issue, would justify a finding on all the other estimates mentioned in the Court's memorandum.

Concerning the conclusions of law and judgment, we have endeavored to include the matter of offsets so as to insure that Woolley's surety shall be entitled to receive any amount for which judgment is rendered for Woolley to apply to whatever amount the surety is required to pay Radkovich and sureties under the Glens Falls' bond. If counsel for either side feel that the question of offsets has not been properly set forth in the conclusions and judgment, they may propose amendments, giving the Court a full explanation therefor.

As to the amount of interest, the computation of interest allowed on the Westinghouse judgment was not furnished the Court as provided by rule 7 (h) of the local District Court Rules. Our computation, if not correct, may be changed by stipulation for an amendment by interlineation. [182]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial and the Court [183] having duly considered the evidence and being fully advised in the premises now finds the following:

I.

That the plaintiff Westinghouse Electric Supply Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to and engaged in doing business in the State of California.

II.

That the defendant Wm. Radkovich Company, Inc., was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and was duly licensed as a contractor in said State.

III.

That the defendant United Pacific Insurance Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

IV.

That the defendant General Casualty Company of America was at all times herein mentioned a cor-

poration duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

V.

That the defendant Excess Insurance Company of America was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of State of New York and authorized to and engaged in doing a general surety business in the State of California.

VI.

That the defendant Manufacturers' Casualty Insurance Company was at all times herein mentioned a corporation duly organized [184] and existing under and by virtue of the laws of the State of Pennsylvania and authorized to and engaged in doing a general surety business in the State of California.

VII.

That at all times herein mentioned cross-defendant E. B. Woolley was a duly licensed electrical contractor in the State of California.

VIII.

That all times herein mentioned cross-defendant Glens Falls Indemnity Company was a corporation duly organized and existing under and by virute of the laws of the State of New York and authorized

to and engaged in doing a general surety business in the State of California.

IX.

On June 19, 1947, defendant Wm. Radkovich Company, Inc., (hereinafter referred to as Radkovich) as prime contractor entered into a contract with the United States of America for the construction of Temporary Family Quarters, Job No. Muroc A.A.F. 7-210-2 at Muroc Army Air Field, Muroc, California, said quarters to consist of 100 concrete houses of the "Letorneau" type as described in said contract (Radkovich's Exhibit B) and the plans and specifications made a part of said contract. Defendants United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America and Manufacturers' Casualty Insurance Company (hereinafter called Radkovich's Sureties) severally executed as Surety for Radkovich a Payment Bond pursuant to the provisions of the Miller Act (Sections 270A and 270B of Title 28, U.S.C.A.)

X.

On July 30, 1947, cross-defendant E. B. Woolley (hereinafter referred to as Woolley) as Electrical Subcontractor entered into a Subcontract (Radkovich's Exhibit C) with Radkovich for certain electrical work described in said prime contract. Cross-defendant Glens Falls Indemnity Company as Surety for Woolley executed a Faithful Perform-

ance Bond and a Payment Bond, each in the sum of \$40,000.00 (Radkovich's Exhibit C). [185]

XI.

Plaintiff Westinghouse Electric Supply Company furnished to Woolley certain electrical materials of the value of \$52,622.22 which materials were used by him in the construction of his work under said Subcontract. There was due, owing and unpaid from Woolley to Westinghouse the sum of \$43,514.05 which became due and owing on the 10th day of April, 1948, and on October 27, 1949, at the request of Woolley and his surety, Radkovich paid to Westinghouse for the account of Woolley the sum of \$16,562.04 which Radkovich admittedly owed Woolley under the latter's Subcontract, thus leaving a balance due Westinghouse for materials furnished to and used by Woolley in the construction of said work in the sum of \$26,952.01 which has been due, owing and unpaid since October 27, 1949.

XII.

That all of the above mentioned materials and supplies furnished by Westinghouse to Woolley were actually used by Woolley in the performance of his Subcontract with Radkovich and in the work required to be done by the said prime contractor under his contract with the United States of America and by Woolley under his Subcontract with Radkovich. That Westinghouse had no direct contractual relationship with Radkovich, but did on April 10, 1948, serve upon Radkovich by registered

mail a notice in writing stating with substantial accuracy the amount claimed by Westinghouse and the name of the party to whom said materials were furnished. That said notice was served within ninety days of the date on which Westinghouse furnished the last of the materials for which claim was made. That the last delivery of materials for which claim is made was on March 31, 1948. That this action was commenced by Westinghouse more than ninety days after the date on which the last of said materials were furnished and prior to the expiration of one year after the date of final settlement of the prime contract.

XIII.

That the agreed price of the electrical subcontract work was the sum of \$80,000.00 and that thereafter on August 18, 1947, the United States of America issued a change order deleting the requirement for electric water [186] heaters which were provided for in the prime contract and the electrical subcontract, and decreasing the total amount of the prime contract by the sum of \$6,100.00 due to the deletion of said water heaters. That by reason of the deduction of said heaters from the material to be furnished by Woolley, he saved the sum of \$5,500.00 and that such amount, as to Woolley, is an equitable deduction from the original amount of his subcontract which was in the sum of \$80,000.00, leaving an adjusted subcontract price of \$74,490.00. That the subcontract work was fully completed by Woolley.

XIV.

That of the adjusted subcontract price in the amount of \$74,490.00 Radkovich paid to Woolley the sum of \$48,914.27 and paid to Westinghouse for the account of and at the request of Woolley the sum of \$16,562.04 making total payments in the sum of \$65,476.31. In addition Radkovich is entitled to a further credit for materials furnished to Woolley of the reasonable value of \$2,213.53 and for payrolls made at the request of Woolley in the sum of \$536.00 making a total of \$2,749.53 which items and amounts were conceded during the trial by Woolley and Glens Falls Indemnity Company, leaving an unpaid subcontract balance of \$6,264.16.

XV.

That at the special instance and request of Radkovich, Woolley furnished additional labor and materials not required under the prime contract between Radkovich and the United States of America nor under the subcontract between Radkovich and Woolley. That the cost of said materials including overhead and reasonable profit thereon is as follows:

	Cost Including		
	Overhead	Profit	Total
Installation of Fixtures			
Installation of Phone Circuits			
Installation of Chime Circuits			
Installation of Closet Lights
Totals			

That none of the above listed labor and materials were required [187] to be furnished or installed under the provisions of the prime contract, the sub-contract or the plans and specifications made a part thereof, nor any changes or modifications thereto.

That there is now due, owing and unpaid from Radkovich to Woolley the total cost of the above listed items, including profit, in the total sum of \$....., and there is now due, owing and unpaid from Radkovich's Sureties to Woolley the cost only of the above listed labor and material, excluding profit, in the total sum of \$.....

The roofs of two of the said concrete buildings collapsed due to faulty construction on the part of Radkovich which collapse damaged two electrical units in said buildings necessitating their replacement which was done by Woolley, and the reasonable value of the labor and materials for the replacement of these two units was the sum of \$107.86 which sum is due, owing and unpaid from Radkovich and his Sureties to Woolley.

XVI.

That Woolley received from Radkovich a notice to proceed with the electrical work on September 1, 1947, and that on that date Woolley did send a crew of men to the job to proceed with the work, but that Radkovich did not erect any houses in which Woolley could place electrical wiring until October 4, 1947, and that between the dates of September 1, 1947, and October 4, 1947, Woolley's total payroll for his crew of men on the job was \$1,149.22,

but he was able only to do prefabrication work at a payroll cost of \$200.00, leaving a payroll for inactive men during this period of \$949.22. That by reason of this delay Woolley was damaged in the amount of \$949.22 for which sum Radkovich is indebted to Woolley but no part of said sum is due or owing from Radkovich's Sureties to Woolley. That other than aforesaid Woolley was not delayed in the completion of his work by Radkovich, nor did Woolley sustain any damage due to any other delay.

XVII.

That there was no material alteration or modification of the subcontract between Woolley and Radkovich; that Radkovich did not take control of said subcontract work; that there were no premature payments [188] made to Woolley by Radkovich; that there were no material changes or modifications of the plans or specifications referred to in said subcontract; that none of the facts alleged by the Glens Falls Indemnity Company as defenses is true.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

Plaintiff Westinghouse is entitled to judgment against defendants Radkovich and his Sureties for the sum of \$26,952.01, plus interest at the rate of % per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the

sum of \$26,952.01 for the period October 28, 1949, to the date of entry of judgment; that Radkovich and his Sureties are entitled to judgment over in like amount against Woolley and Glens Falls Indemnity Company; that Woolley is entitled to judgment against Radkovich in the sum of \$. and against Radkovich's Sureties in the sum of \$.; that one-half the court costs shall be borne by Woolley and his Surety and the other half by Radkovich and his Sureties.

Let judgment be entered accordingly.

.....

Jacob Weinberger,
United States District Judge

JUDGMENT

The above entitled action came on for trial before the Court [190] without a jury on May 17, 1951, the plaintiff appearing by its attorney, Glen Behymer; the defendants Wm. Radkovich Company, Inc., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, appearing by Eldon V. McPharlin of Anderson, McPharlin & Conners; defendant E. B. Woolley appearing by his attorney, Frank M. Benedict; and cross-defendant Glens Falls Indemnity Company, a corporation, appearing by John E. McCall and Harold J. Decker, and testimony having been offered and

briefs filed and the Court having filed its Findings of Fact, Conclusions of Law and Order for Judgment and its Memorandum of Conclusions herein, now pursuant to said Order for Judgment, it is hereby

Ordered and adjudged that the plaintiff United States of America, at the relation of and to the use of Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of \$26,952.01 for the period October 28, 1949, to the date of this Judgment; that defendant Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company have judgment over and against defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company; that defendant E. B. Woolley have judgment against Wm. Radkovich Company, Inc., in the sum of \$. and against United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance [191] Company in the sum of \$.; that one-half the court costs

shall be borne by defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company and one-half by Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company.

Dated: October, 1951.

.....

Jacob Weinberger,
United States District Judge.

[Endorsed]: Filed Feb. 7, 1952. [192]

[Title of District Court and Cause.]

**OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND PROPOSED FINDINGS, CON-
CLUSIONS AND JUDGMENT**

Cross-defendants, E. B. Woolley and Glens Falls Indemnity Company, a corporation, object to the findings proposed by Wm. Radkovich Company, Inc. and its sureties, and as grounds therefor urge the following:

I.

As to Finding X, said cross-defendants urge that there be added thereto the following:

“That said Faithful Performance Bond and said Payment Bond were executed by cross-defendant Glens Falls Indemnity Company at the same time, under the same bond number, for only one premium,

and both bonds relate to said subcontract.” [193]

Comment: This addition is a finding of fact proved by said bonds in evidence (Radkovich’s Exhibit C), is material to the issues and reflects the Court’s announced views. (Memorandum of Decision, P. 18.)

II.

As to Finding XIII, said cross-defendants urge that there be added thereto, beginning on Page 5, Line 8, the following:

“Said subcontract was completed by Woolley on the 6th day of October, 1948.”

Comment: The above addition in a finding based on uncontroverted evidence, is material to the issues and justifies the allowance of interest to Woolley from the date mentioned.

III.

As to Finding XV, said cross-defendants urge as follows:

(a) That the following portion be deleted: commencing at Page 5, Line 23, and continuing to Line 31 of said page:

“That the cost of said materials including overhead and reasonable profit thereon is as follows:

	Cost Including		
	Overhead	Profit	Total
Installation of Fixtures
Installation of Phone Circuits
Installation of Chime Circuits
Installation of Closet Lights
Totals”

(b) That the following be inserted in lieu of the foregoing:

“That said additional labor and materials consisted of the following items, the cost and reasonable value of which are as follows: [194]

“Installation of Fixtures	\$4,800.00
Installation of Phone Circuits	133.33
Installation of Chime Circuits	2,111.80
Installation of Closet Lights	1,232.54
	<hr/>
Total	\$8,277.67

“That said additional labor and materials were furnished to be used and were actually used in and about the erection and construction of said improvement.”

(c) That the following portion be deleted: commencing at Page 6, Line 4 and continuing to Line 8 of said page:

“That there is now due, owing and unpaid from Radkovich to Woolley the total cost of the above-listed items, including profit, in the total sum of \$., and there is now due, owing and unpaid from Radkovich’s Sureties to Woolley the cost only of the above-listed labor and material, excluding profit, in the total sum of \$.”

(d) That the following be inserted in lieu of the foregoing:

“That no part of said sum of \$8,277.67 has been paid and said sum of \$8,277.67 is now due, owing and unpaid from said Radkovich and his sureties to Woolley.”

Comment: The material which it is proposed be

deleted relates to overhead and profit of the extras mentioned which, as set forth in Frank M. Benedict's letter to the Court dated November 7, 1951, are not involved. The material to be added to said Finding is in accordance with the evidence and removes any question as to the extras not having been used in the work of improvement.

IV.

As to Finding XVI, said cross-defendants urge the following: that the first sentence thereof be deleted and the [195] following inserted in lieu hereof:

“That Woolley received from Radkovich a notice to proceed with the electrical work on August 28, 1947, and on that date Woolley was ready, willing and able to commence work under said subcontract and had a crew of men on the job for that purpose but Radkovich did not erect any houses in which Woolley could install electrical work until October 4, 1947, during all of which time Woolley was ready, willing and able to commence work under said subcontract and that Radkovich thereby breached said subcontract; that Woolley's total payroll for his crew of men on said job during said period was \$1,149.22 but he was able only to do prefabricating work at a payroll cost of \$200.00, leaving a payroll for inactive men during said period of \$949.22.”

Comment: The change proposed is for the purpose of making the finding more definite and certain and to comply with the Court's views. (Memo. of Dec., P. 44.) The correction of the date “September

1, 1947" to "August 28, 1947" is in accordance with the evidence. (Rep. Tr. p. 196, L. 19 to p. 197, L. 15.)

V.

As to Finding XVII, said cross-defendants urge that there be inserted on page 6, line 32, following the semicolon, the following:

"That Ralph E. Ferguson was the Resident Engineer on said job from its commencement to completion; that Woolley presented estimates to Radkovich dated September 25, 1947, November 1, 1947, November 24, 1947, January 12, 1948, February 12, 1948, and March 10, 1948 (Glens Falls Exhibit 13); that said estimate dated September 25, 1947, was in the amount of [196] \$9,885.37 for materials, sales tax and freight but with no labor cost listed, on which estimate said Resident Engineer allowed Woolley the sum of \$5,000.00, which Radkovich paid to Woolley on October 22, 1947, together with the sum of \$4,000.00, which latter amount Radkovich loaned to Woolley in return for the payment by Woolley to Radkovich of the sum of \$500.00 as interest; that the payment by Radkovich to Woolley of said sum of \$4,000.00 was not a premature payment to Woolley but was a loan by Radkovich to Woolley which was deducted by Radkovich from a second or third payment made to Woolley by Radkovich under said subcontract.

"That said second estimate, dated November 1, 1947, presented by Woolley to Radkovich, shows identical materials listed on the previous estimate of September 25, 1947, plus some other materials

and the notation: 'materials to date, \$13,111.71' and 'labor costs to date, \$3,439.38' and is in the total amount of \$16,551.09, on which estimate Woolley was paid by Radkovich the sum of \$15,000.'

Comment: The above addition is material to the issues and reflects the Court's views (Memorandum of Decision, Pages 22, 26 and 27). That Ralph E. Ferguson was the Resident Engineer on the job is undisputed (Rep. Tr. P. 88, L. 3—13). No attempt was made to controvert the estimates submitted by Woolley which speak for themselves. (Glens Falls Exhibit 13.) The portion of the foregoing addition relating to the alleged loan of \$4,000.00 is based entirely on the testimony of Radkovich (See Radkovich's testimony: Rep. Tr. P. 70, L. 19-25; P. 73, L. 8-17; P. 74, L. 3 to P. 75, L. 1; P. 76, L. 7 to P. 78, L. 17) except in reference to the date of payment which is based on the uncontroverted [197] testimony of Woolley. (See Woolley's testimony: Rep. Tr. P. 234, L. 9 to P. 235, L. 5; also check for \$500.00, Glen's Falls Exhibit No. 3.)

It is respectfully urged that the Court should consider the above objections and settle and determine the form of the findings to be entered herein.

Respectfully submitted,

JOHN E. McCALL and J. HAROLD
DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Glens Falls Indemnity
Company.

/s/ FRANK M. BENEDICT,
Attorney for E. B. Woolley. [198]

First: That plaintiff Westinghouse is entitled to judgment against defendant Radkovich and his Sureties for the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the sum of \$26,952.01 for the period October 28, 1949, to the date of entry of judgment.

Second: That Cross-Complainant E. B. Woolley is entitled to judgment against Wm. Radkovich Company, Inc. and its Sureties, United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company, in the sum of \$15,249.69, together with interest thereon at the rate of 7% from the 6th of October, 1948, to the date of this judgment, making a total judgment against Wm. Radkovich Company, Inc. and his sureties of \$.....

Third: That Cross-Complainant E. B. Woolley is entitled to judgment against said Wm. Radkovich Company, Inc. in the further sum of \$949.22.

Fourth: That Wm. Radkovich Company, Inc., and its Sureties are entitled to judgment against Cross-Defendant E. B. Woolley and his Surety, Glens Falls Indemnity Company, in the sum of \$....., being the total sum of principal and interest as shown in paragraph First and that from said amount there be deducted as an offset the sum of \$....., being the total sum of principal and interest as shown in paragraph Second, to which the

said E. B. Woolley and his Surety, Glens Falls Indemnity Company, are entitled as a credit.

The Court further concludes that Wm. Radkovich Company, Inc., and its Sureties named in paragraph First, is entitled to judgment against E. B. Woolley and his Surety, Glens Falls Indemnity Company, in the sum of \$....., being the balance of principal and interest after the offset mentioned above. [199]

It Is Hereby Ordered, Adjudged and Decreed by the Court as follows:

First: That Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of \$26,952.01 for the period October 28, 1949, to the date of this judgment, making a total sum of \$.....

Second: That Cross-Claimant E. B. Woolley have judgment against Wm. Radkovich Company, Inc. and its said sureties named in paragraph First for the sum of \$15,249.69, together with interest thereon at the rate of 7% from the 6th day of October, 1948, to date of this judgment, making a total sum of \$.....

Third: That Cross-Complainant E. B. Woolley have judgment against said Wm. Radkovich Company, Inc. in the further sum of \$949.22.

Fourth: That Wm. Radkovich Company, Inc. and its sureties named in paragraph First have judgment against Cross-Defendants E. B. Woolley and his surety, Glens Falls Indemnity Company, in the sum of \$....., as shown in paragraph First and that from this amount there be deducted as an offset the sum of \$....., as shown in paragraph Second, to which Cross-Claimant and Cross-Defendant E. B. Woolley and his surety, Glens Falls Indemnity Company, are entitled as a credit.

It Is Therefore Ordered that Wm. Radkovich Company, Inc. and its sureties named in paragraph First have judgment against Cross-Defendants E. B. Woolley and his surety, Glens Falls Indemnity Company, in the sum of \$..... [200]

[Title of District Court and Cause.]

SECOND PROPOSED FORM OF JUDGMENT

The above entitled action came on for trial before the Court, without a jury, on May 17, 1951, the plaintiff appearing by its attorney, Glen [201] Behymer; the defendants Wm. Radkovich Company, Inc., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manu-

facturers' Casualty Insurance Company, a corporation, appearing by Eldon V. McPharlin of Anderson, McPharlin & Connors; defendant E. B. Woolley appearing by his attorney, Frank M. Benedict; and cross-defendant Glens Falls Indemnity Company, a corporation, appearing by John E. McCall and J. Harold Decker, and testimony having been offered and briefs filed and the Court having filed its Findings of Fact, Conclusions of Law and Order for Judgment and its Memorandum of Conclusions herein, now pursuant to said Order for Judgment,

It Is Hereby Ordered and Adjudged:

(1) That the plaintiff United States of America, at the relation of and to the use of Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of \$26,952.01 for the period October 28, 1949, to the date of this Judgment;

(2) That defendant Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company have judgment over in like amount against defendant E. B. Woolley and

cross-defendant Glens Falls Indemnity Company;

(3) That defendant E. B. Woolley have judgment against Wm. Radkovich Company, Inc., in the sum of \$....., which amount defendant E. B. Woolley and his Surety, Glens Falls Indemnity Company, [202] are entitled to offset against the judgment in favor of Wm. Radkovich Company, Inc.;

(4) That defendant E. B. Woolley have judgment against United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, Manufacturers' Casualty Insurance Company in the sum of \$....., which amount E. B. Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of said United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company;

(5) That one-half the court costs shall be borne by defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company and one-half by Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company.

Dated: November, 1951.

.....

JACOB WEINBERGER,
United States District Judge.

Conclusions of Law (Second Proposed Form)

From the foregoing facts the Court concludes:

I.

Plaintiff Westinghouse is entitled to judgment against defendants Radkovich and his Sureties for the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the sum of \$26,952.01 for the period October 28, 1949, to the date of entry of judgment; that Radkovich and his Sureties are entitled to judgment over in like amount against Woolley and Glens Falls Indemnity Company; that Woolley is entitled to judgment against Radkovich in the sum of \$....., which amount Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of Radkovich; that Woolley is entitled to judgment against Radkovich's Sureties in the sum of \$....., which amount Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of Radkovich's Sureties; that one-half the court costs shall be borne by Woolley and his Surety and the other half by Radkovich and his Sureties.

Let judgment be entered accordingly.

.....

JACOB WEINBERGER,

United States District Judge.

[Letterhead of Anderson, McPharlin & Connors]

October 26, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc. vs.
Wm. Radkovich Company, Inc., et al.
District Court No. 9303 Y

Dear Judge Weinberger:

Enclosed herewith in duplicate are the Findings of Fact, Conclusions of Law and Judgment. The Memorandum of Conclusions specifies that Woolley is entitled to an extra for the fixtures, chimes, closet lights and phone circuits, including profit, as against Radkovich Company, but only for the cost thereof excluding profit as against Radkovich's Sureties. These amounts have been left blank in the Findings and Judgment because of the discrepancy between Woolley's testimony and the amount of his claim. The only testimony in reference to this matter begins on page 205 of the Transcript wherein Woolley was questioned about his \$4,800 labor charge and he testified that it was computed on the basis of 1200 man hours at \$4 an hour, but that his actual cost was \$2.40 an hour plus 2.7 and 1 per cent and 2.18 per cent per hundred. He then further testified that he thought he had charged 15 per cent for overhead and 10 per cent for profit upon the actual cost. In accordance with Woolley's testimony the actual wages, including the percentage items he

referred to and 15 per cent overhead and 10 per cent profit, would make a total of \$3.14 per hour, and for 1200 hours the total sum of \$3,768.00, and the total cost, excluding the 10 per cent profit, would be \$3,480.00.

Yours very truly,

/s/ ELDON V. McPHARLIN.

EVM:pm Enc. cc. Frank M. Benedict, John E. McCall and J. Harold Decker. [205]

[Letterhead of Frank M. Benedict]

November 7, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm. Radkovich Company, Inc., et al. District Court No. 9303 Y.

Dear Judge Weinberger:

I am in receipt of a copy of the proposed Findings of Fact, Conclusions of Law and Judgment as prepared by Mr. McPharlin, together with a copy of his letter to you dated October 26, 1951. There are certain exceptions to the proposed findings and judgment which I desire be brought to your attention. As Mr. McCall and Mr. Decker likewise desire to file exceptions, I have asked them to incorporate my exceptions with theirs in order to simplify the matter.

In reference to the extras allowed Woolley in the Memorandum of Conclusions, I have discussed with Mr. Woolley his testimony regarding his labor costs for said items, referred to in Mr. McPharlin's letter. He advises me that he was mistaken when he stated that his labor costs of \$4,800.00 for installing the fixtures included overhead and profit. It seems he had overlooked the fact that he had paid his men \$7.00 per day each for subsistence, so that actually his labor costs work out at the rate of at least \$4.00 per hour. Woolley's payroll summary, (Woolley's Exhibit 12) shows the payment of said subsistence pay during the whole of the time Woolley was engaged on the job. In other words, the payroll record shows that the average cost to Woolley per man hour was at least \$4.00 per hour, exclusive of either overhead or profit.

In reference to the labor involved in all of the other extras, there appears to be no testimony in the record that said labor was other than actual cost at \$4.00 per hour as supported by said payroll record.

It is respectfully submitted, therefore, that the following items left blank in the findings should be given as follows: [206]

Cost of Installation of Fixtures.....	\$4,800.00
Cost of Installation of 'Phone Circuits....	133.33
Cost of Installation of Chime Circuits....	2,111.80
Cost of Installation of Closet Lights.....	1,232.54
	<hr/>
Total	\$8,277.67

While I feel that the payroll record in evidence

amply supports Woolley's position in this matter, if there is any doubt in the Court's mind regarding it, I respectfully request the reopening of the case to present further evidence on the point.

Yours very truly,

/s/ FRANK M. BENEDICT.

FMB/ws cc John E. McCall, J. Harold Decker, Eldon V. McPharlin. All in Rowan Bldg. [207]

[Letterhead of Anderson, McPharlin & Connors]

November 16, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm. Radkovich Co., Inc., et al. District Court No. 9303 Y.

Dear Judge Weinberger:

Enclosed herewith are a proposed amended Conclusions of Law and Judgment in which I have included provisions for offset of the judgments which the parties have against each other.

The proposed amended Judgment and Conclusions of Law which have been filed by the attorneys for the Glens Falls Indemnity Company are objectionable to the undersigned in that they provide for judgment for E. B. Woolley in an amount that is excessive and not in accordance with the Memo-

random Conclusions of the Court and, also, for interest to Woolley which was not provided for in the Court's Memorandum. Furthermore, Woolley's proposed Conclusions and Judgment do not distinguish between the judgment he is entitled to as against Radkovich and as against Radkovich's Sureties.

A copy of the enclosed proposed Conclusions of Law and Judgment have been served upon the attorneys for E. B. Woolley and Glens Falls Indemnity Company.

Yours very truly,

/s/ ELDON V. McPHARLIN.

EVM:pm. Enc. cc. John E. McCall and J. Harold Decker, Frank M. Benedict. [209]

[Letterhead of Frank M. Benedict]

November 23, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc. vs. Wm. Radkovich Company, Inc., et al. District Court No. 9303 Y.

Dear Judge Weinberger:

I enclose herewith Objections to the Proposed Findings of Fact submitted by Wm. Radkovich Company, Inc. and its Sureties which I hope you will find to be self-explanatory. In the preparation

of said Objections it was noticed that the amendment of the last part of the Judgment and the last part of the Conclusions of Law heretofore submitted by Mr. McCall and Mr. Decker included in the judgment against Radkovich and its Sureties the sum of \$949.22, being the item for damages for delay sustained by Woolley, which is contrary to the Court's Memorandum of Decision. Accordingly, I have rewritten said amendments and enclose an original and a copy thereof herewith. A copy of said enclosures is likewise being mailed to the attorneys for Wm. Radkovich Company, Inc.

Yours very truly,

/s/ FRANK M. BENEDICT.

FMB/ws. Enclosures: CC to John E. McCall, J.
Harold Decker, Eldon V. McPharlin. [210]

San Diego, California, December 11, 1951

Mr. Eldon V. McPharland, Esq.
1017 Rowan Building
Los Angeles 13, California

Re: U.S.A. vs. Wm. Radkovich Co.
9303-W Civil

Dear Mr. McPharland:

At the request of Judge Weinberger, I am writing to ask if you would give him your comments on the objections to proposed findings of fact submitted by counsel for E. B. Woolley and for Glens Falls Indemnity Company. Also, your comments on the form of proposed amendments to findings and

conclusions submitted by Mr. Benedict.

Judge Weinberger would appreciate it if you can comply with this request within the next 2 or 3 days.

Sincerely,

BERNICE MORRIS
Law Clerk

BM:ct

[211]

[Letterhead of Anderson, McPharlin & Connors]

December 14, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm.
Radkovich Co., Inc., et al. District Court
No. 9303-Y.

Dear Judge Weinberger:

I would like to make the following comments on the objections submitted by counsel for Woolley and Glens Falls Indemnity Company to the proposed findings of fact and, also, to the proposed amendments submitted, and, for convenience, I will follow the paragraph numbering of the objections.

Paragraph I of the objections: The date of the bonds is not in issue and is shown on the face of the bonds themselves. The wording, "for only one premium," is ambiguous since there were two bonds executed, each in the amount of \$40,000.00, making

total of \$80,000.00, which was the original amount of the subcontract. The rate of premium on the bonds, as indicated on the face of the performance bond, was \$7.50 per thousand which, when based upon the total amount of the two bonds in the sum of \$80,000.00, would mean a premium of \$600.00, which was the amount that was charged by Glens Falls Indemnity Company as was shown on the face of the performance bond. In addition, I do not feel that any method that the Glens Falls Indemnity Company might follow in allocating such premium that they collected would be material insofar as liability under the bonds is concerned.

Paragraph II of objections: The request for an amendment stating, "Said subcontract was completed by Woolley on the 6th day of October, 1948," is not an accurate statement of the facts since, when it is said that the subcontract was completed, it would be inferred that the subcontract was fully performed, which is not the case. The performance of the contract involves not only the doing of the work, but the furnishing and paying for all materials used by the subcontractor, and, in this case, Woolley still has not paid Westinghouse for materials furnished to and used by him in the construction. I feel that a more accurate statement or wording of fact would be to say that the "work" was completed on said date, but that the subcontractor had not fully complied with or performed under the provisions of the subcontract in that he had failed to pay for materials supplied to and used by him in his work. [212] For the same reasons, Woolley

would not be entitled to interest from such date since payment would not be due until he had fully performed under his subcontract which he still has not done.

Paragraph III of objections: The Court in its memorandum of conclusions awarded to Woolley as against Radkovich alone the cost plus overhead and profit of the items listed, but as against Radkovich's Sureties, the Court properly allowed only the cost and overhead and excluded the profit. Therefore, it is obviously necessary to show the breakdown by the cost including overhead and profit. Woolley's total claim for these items, including profit, are the amounts that are set out, and therefore, in arriving at the judgment against Radkovich's Sureties, the profit will have to be deducted from such items in accordance with the Court's determination as to the amount of cost and the amount of profit, which question has been brought to the Court's attention in previous communications from this writer and from counsel for Woolley. Also, under paragraph III (b) opposing counsel has requested an amendment stating that the additional labor and materials were furnished and used in "said improvement". I do not believe this is an accurate statement since the words, "said improvement," could obviously only refer to the improvement provided for in the general contract, the subcontract and the plans and specifications pertaining thereto, while, in this case, the court has found that the additional labor and materials furnished by Woolley were for work outside of said contracts, plans and specifications.

Paragraph III (c) and (d) of objections: The question of cost, overhead and profit has already been commented upon above. The objection and proposed amendment has drawn this writer's attention to an error that has been made in my own proposed findings in using the wording, "That there is now due, owing and unpaid from Radkovich to Woolley, etc." Since Woolley still has not fully performed his subcontract in that he has not paid Westinghouse, there is nothing now due, owing and unpaid from Radkovich to him, and there will not be until Woolley has paid the material bill of Westinghouse. It is suggested that better wording would be to state, "That the amount which will be due, owing and unpaid from Radkovich to Woolley, after payment by Woolley and his Surety of the amount due Westinghouse, is, etc."

Paragraph IV of objections: Insofar as the discrepancy of the dates September 1, 1947, and August 28, 1947, is concerned, it is the writer's recollection that there is in evidence the written notice to Woolley to commence work on September 1, 1947; however, this writer could be in error on that point since a copy of the exhibit is not available. Woolley's testimony was that the time commenced on August 28, 1947. In reference to the proposed amendment and the wording, "that Radkovich thereby breached said subcontract," the writer wishes to point out that Woolley's testimony was to the effect that prefabbing is the ordinary way of doing this type of job but that he did not have any approved plan for this prefabbing during that

period and was thus prevented from doing further productive work (Woolley's testimony, page 265), and this would relate to Woolley's duty in obtaining approved drawings for this detail work. [213]

Paragraph V of objections: This proposed amendment is in effect a request to insert numerous evidentiary matter rather than a finding of fact on a matter in issue. It is felt that if such evidentiary matter is to be included in the findings, then counsel for Radkovich and his Sureties would be compelled to also insist that their testimony and evidence which is contrary to, or which shows the immateriality of, that suggested in the amendment be also included in the findings.

Paragraph Second of Mr. Benedict's proposed amendments to conclusions of law: The amount of the judgment as set out in this paragraph is not correct and the exact amount will depend upon the Court's computation as to those items of additional work and materials which are involved. Furthermore, as previously commented upon, Woolley is not entitled to interest since he still has not performed the subcontract and did not pay his material supplier who instituted this suit against Radkovich and his Sureties.

Paragraph Fourth of the proposed amendment to the conclusions of law also includes reference to interest due Woolley which is objectionable for the same reasons.

The proposed judgment is objectionable on the same grounds as the conclusions of law. I feel that in order to more clearly set out the parties' respec-

tive rights of offset that there should be added to paragraph Second a clause to the effect, "and that Radkovich and his Sureties are entitled to offset against said judgment an equal amount of the judgment in their favor against Woolley and his Surety." In the writer's opinion the proposed conclusions and judgment do not clearly enough set out the rights of the parties to offset their respective judgments in an equal amount in order to make the net result a judgment over for Radkovich and his Sureties for the balance.

Copies of this letter are being forwarded to the attorneys for E. B. Woolley and Glens Falls Indemnity Company.

Yours very truly,

/s/ ELDON V. McPHARLIN

EVM:pm—cc. John E. McCall and J. Harold

Decker, Frank M. Benedict. [214]

San Diego 1, California, December 28, 1951

Mr. Frank M. Benedict, Esq.
912 Rowan Bldg., 458 South Spring St.,
Los Angeles 13, California

Re: United States of America, etc., vs. Wm.
Radkovich Company, Inc., et al.
No. 9303-Y-Civil

Dear Mr. Benedict:

Regarding your letter of November 7, 1951 wherein you mention that Mr. Woolley was in error

when he stated that the amounts prayed for as "extras" included profit, labor costs and overhead, and that such amounts actually included only labor costs, Judge Weinberger wishes me to point out that in your brief filed January 26, 1951 you segregated the labor, profit and overhead on each of these items. The profit and overhead shown adds up to \$1,200.00.

An examination of the payroll does show that Woolley paid subsistence and in some instances, mileage, and that the cost of such items, together with actual wages, was in excess of \$2.00, and was probably \$4.00 per hour. However, Judge Weinberger does not recall any testimony about the number of hours it required to complete these "extras" other than it required about 1200 man hours to install the fixtures. If you can find in the transcript the testimony referring to the number of hours required on each of the other "extra" items, Judge Weinberger will be glad to consider the matter. In any event, he is disposed to allow the findings, etc., to recite that Woolley should have judgment against Radkovich and sureties for \$4,800 as the cost of installing the fixtures, and against Radkovich for \$4,800 plus overhead and profit. Please give us your computation on the latter amount.

Unless you can cite us where the number of man hours in [215] installing the other "extras" is shown in the transcript, Judge Weinberger wishes me to tell you he wishes the findings to show, as to these other "extras" the sums for labor, profit,

overhead as set forth in your brief filed on January 26, 1951.

May we hear from you by January 7th?

Sincerely,

BERNICE MORRIS

Law Clerk

BM:ct—cc—John E. McCall, Esq., J. Harold
Decker, Esq., Eldon V. McPharlin, Esq. [216]

[Letterhead of Frank M. Benedict]

January 8, 1952

Honorable Jacob Weinberger, U. S. District Court,
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm.
Radkovich Company, Inc., et al., District
Court No. 9303-Y.

Dear Judge Weinberger:

Taking advantage of the four-day New Year's Holiday has delayed my making earlier reply to your letter of December 28, 1951, for which please accept my apologies.

In reference to the number of man hours expended by Woolley on extras, I have checked the Reporter's Transcript. Woolley testified to the effect that he expended 400 man hours at \$4.00 an hour in the installation of the fixtures. (P. 205, L. 17 to 24; P. 243, L. 24 to P. 244, L. 3). In connection with the 'phone circuits Woolley testified that

he expended $33\frac{1}{3}$ man hours at \$4.00 an hour, a total of \$133.33. (P. 244, L. 14 to 18). In reference to the closet lights Woolley testified that he expended 200 man hours at \$4.00 an hour, a total of \$800.00, and \$432.54 for material. (P. 244, L. 22 to L. 25). As regards the extra for chime circuits it is true that Woolley did not testify as to the number of man hours but merely testified that this extra consisted of labor at \$400.00 and material at \$1,711.80. (P. 244, L. 7 to 13). However, according to my copy of Woolley's Exhibit No. 14, not only are the number of man hours set forth in reference to all of the foregoing extra items but the chime circuit installation is set forth at 100 man hours at \$4.00 per hour, together with materials in the sum of \$1,711.80.

It is true, as you pointed out, that in my brief filed January 26, 1951, I segregated the labor, profit and overhead on each of the items of extras, except the phone circuits, but I was acting under the belief at that time that all these items included overhead and profit as Mr. Woolley had stated.

It is respectfully submitted, therefore, that Finding XV [217] of the findings proposed by Radkovich and its sureties should be modified as indicated in Paragraph III of Objections to Proposed Findings of Fact on file herein.

Yours very truly,

/s/ FRANK M. BENEDICT

FMB/ws—cc: to John E. McCall, J. Harold
Decker, Eldon V. McPharlin.

[218]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

I.

That the plaintiff Westinghouse Electric Supply Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to and engaged in doing business in the State of California.

II.

That the defendant Wm. Radkovich Company, Inc., was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and was duly licensed as a contractor in said State.

III.

That the defendant United Pacific Insurance Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

IV.

That the defendant General Casualty Company of America was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

V.

That the defendant Excess Insurance Company of America was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the [220] State of New York and authorized to and engaged in doing a general surety business in the State of California.

VI.

That the defendant Manufacturers' Casualty Insurance Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and authorized to and engaged in doing a general surety business in the State of California.

VII.

That at all times herein mentioned cross-defendant E. B. Woolley was a duly licensed electrical contractor in the State of California.

VIII.

That at all times herein mentioned cross-defendant Glens Falls Indemnity Company was a corporation duly organized and existing under and by vir-

tue of the laws of the State of New York and authorized to and engaged in doing a general surety business in the State of California.

IX.

On June 19, 1947, defendant Win. Radkovich Company, Inc., (hereinafter referred to as Radkovich) as prime contractor entered into a contract with the United States of America for the construction of Temporary Family Quarters, Job No. Muroc A.A.F. 7-210-2 at Muroc Army Air Field, Muroc, California, said quarters to consist of 100 concrete houses of the "Letorneau" type as described in said contract (Radkovich's Exhibit B) and the plans and specifications made a part of said contract. Defendants United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America and Manufacturers' Casualty Insurance Company (hereinafter called Radkovich's Sureties) [221] severally executed as Surety for Radkovich a Payment Bond pursuant to the provisions of the Miller Act (Sections 270A and 270B of Title 28, U.S.C.A.)

X.

On July 30, 1947, cross-defendant E. B. Woolley (hereinafter referred to as Woolley) as Electrical Subcontractor entered into a Subcontract (Radkovich's Exhibit C) with Radkovich for certain electrical work described in said prime contract. Cross-defendant Glens Falls Indemnity Company as Surety for Woolley executed a Faithful Perform-

ance Bond and a Payment Bond, each, in the sum of \$40,000 (Radkovich's Exhibit C.)

XI.

Plaintiff Westinghouse Electric Supply Company furnished to Woolley certain electrical materials of the value of \$52,622.22 which materials were used by him in the construction of his work under said Subcontract. There was due, owing and unpaid from Woolley to Westinghouse the sum of \$43,514.05 which became due and owing on the 10th day of April, 1948, and on October 27, 1949, at the request of Woolley and his surety, Radkovich paid to Westinghouse for the account of Woolley the sum of \$16,562.04 which Radkovich admittedly owed Woolley under the latter's Subcontract, thus leaving a balance due Westinghouse for materials furnished to and used by Woolley in the construction of said work in the sum of \$26,952.01 which has been due, owing and unpaid since October 27, 1949.

XII.

That all of the above mentioned materials and supplies furnished by Westinghouse to Woolley were actually used by Woolley in the performance of his Subcontract with Radkovich and in the work required to be done by the said [222] prime contractor under his contract with the United States of America and by Woolley under his Subcontract with Radkovich. That Westinghouse had no direct contractual relationship with Radkovich, but did on April 10, 1948, serve upon Radkovich by registered mail a notice in writing stating with sub-

stantial accuracy the amount claimed by Westinghouse and the name of the party to whom said materials were furnished. That said notice was served within ninety days of the date on which Westinghouse furnished the last of the materials for which claim was made. That the last delivery of materials for which claim is made was on March 31, 1948. That this action was commenced by Westinghouse more than ninety days after the date on which the last of said materials were furnished and prior to the expiration of one year after the date of final settlement of the prime contract.

XIII.

That the agreed price of the electrical subcontract work was the sum of \$80,000.00 and that thereafter on August 18, 1947, the United States of America issued a change order deleting the requirement for electric water heaters which were provided for in the prime contract and the electrical subcontract, and decreasing the total amount of the prime contract by the sum of \$6,100.00 due to the deletion of said water heaters. That by reason of the deduction of said heaters from the material to be furnished by Woolley, he saved the sum of \$5,500.00 and that such amount, as to Woolley, is an equitable deduction from the original amount of his subcontract which was in the sum of \$80,000.00, leaving an adjusted subcontract price of \$74,490.00. That the subcontract work was fully completed by Woolley.

XIV.

That of the adjusted subcontract price in the

amount of \$74,490.00 Radkovich paid to Woolley the sum of \$48,914.27 and paid to Westinghouse for the account of and at the request of Woolley the sum of \$16,562.04 making total payments in the sum of \$65,476.31. In addition Radkovich is entitled to a further credit for materials furnished to Woolley of the reasonable value of \$2,213.53 and for payrolls made at the request of Woolley in the sum of \$536.00 making a total of \$2,749.53 which items and amounts were conceded during the trial by Woolley and Glens Falls Indemnity Company, leaving an unpaid subcontract balance of 6,264.16.

XV.

That at the special instance and request of Radkovich Woolley furnished additional labor and materials not required under the prime contract, the sub-contract nor under any changes or modifications of said contracts, but which were furnished to be used and were actually used in additions to the structures and improvements covered by said contracts. That said labor and materials consisted of the following items, the cost and reasonable value of which are as follows:

Installation of Fixtures	\$4,800.00
Installation of Phone Circuits	\$ 133.33
Installation of Chime Circuits.....	\$2,111.80
Installation of Closet Lights	\$1,232.54
	<hr/>
Total.....	\$8,277.67

That no part of said sum of \$8,277.67 has been paid and said sum of \$8,277.67 is now due, owing and unpaid from said Radkovich and his sureties to Woolley.

The roofs of two of said concrete buildings collapsed due to faulty construction on the part of [224] Radkovich which collapse damaged two electrical units in said buildings necessitating their replacement which was done by Woolley, and the reasonable value of the labor and materials for the replacement of said units was the sum of \$107.86 which sum is due, owing and unpaid from Radkovich and his Sureties to Woolley.

XVI.

That prior to August 28, 1947 Woolley received from Radkovich a notice to proceed with the electrical work and on August 28, 1947, Woolley was ready, willing and able to commence work under said subcontract and had a crew of men on the job for that purpose but Radkovich did not erect any structures in which Woolley could install electrical work until October 4, 1947, during all of which time Woolley was ready, willing and able to commence work under said subcontract; that Woolley's total payroll for his crew of men on said job during said period was \$1,149.22 but he was able only to do pre-fabricating work at a payroll cost of \$200.00, leaving a payroll for inactive men during said period of \$949.22. That by reason of this delay Woolley was damaged in the amount of \$949.22 for which sum Radkovich is indebted to Woolley but

no part of said sum is due or owing from Radkovich's Sureties to Woolley. That Woolley completed the subcontract work and the other work required of him by Radkovich on October 6, 1948; that other than aforesaid Woolley was not delayed in the completion of his work through fault of Radkovich.

XVII.

That Woolley presented to Radkovich an estimate dated September 25, 1947, for materials, sales tax and freight in the sum of \$9,885.37; that on October 22, 1947, [225] Radkovich paid Woolley the sum of \$5,000 on such estimate; that also on said date Radkovich loaned Woolley the sum of \$4,000, for which loan Woolley promised to and did pay to Radkovich the sum of \$500.00 as interest; that said payment of \$4,000 was a loan by Radkovich to Woolley, was not a premature payment, and said sum was deducted by Radkovich from a payment made on a subsequent estimate furnished by Woolley.

XVIII.

That there is no evidence from which the Court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the Court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the Court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month.

That there is no evidence that the terms of the subcontract were altered to change the method and amount of payments to Woolley, and there is no evidence that there was any departure from the terms of the subcontract with reference to the method and amount of payments to Woolley.

That Radkovich did not take control of said subcontract work; that there were no material changes or modifications of the plans or specifications referred to in said subcontract.

That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses. [226]

Conclusions of Law

From the foregoing facts the Court concludes:

I.

That plaintiff Westinghouse is entitled to judgment against defendant Radkovich and his Sureties for the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the sum of \$26,952.01 for the period October 28, 1949 to the date of judgment.

II.

That Wm. Radkovich Company, Inc., and its sureties are entitled to judgment against E. B. Woolley and his surety, Glens Falls Indemnity Company, in the total sum of principal and interest as shown in paragraph I.

III.

That E. B. Woolley is entitled to judgment against Wm. Radkovich Company, Inc. and its Sureties in the sum of \$15,249.69, which amount E. B. Woolley and his surety are entitled to have deducted as an offset against the amount due Radkovich Company, Inc. and its Sureties as shown in Paragraph II.

IV.

That E. B. Woolley is entitled to judgment against said Wm. Radkovich Company, Inc., in the further sum of \$949.22, which sum Glens Falls Indemnity Company is entitled to apply to diminish the amount, if any, paid by it under the judgment herein.

V.

That one-half the Court costs shall be borne by Woolley and his Surety and the other half by Radkovich and [227] his Sureties.

Let judgment be entered accordingly.

Dated this 7th day of February, 1952.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed Feb. 7, 1952. [228]

in the District Court of the United States, Southern
District of California, Central Division

No. 9303-W Civil

UNITED STATES OF AMERICA, et al.,
Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC, et al.,
Defendants.

WM. RADKOVICH COMPANY, INC., et al.,
Cross-Claimants,

vs.

J. B. WOOLLEY and GLENS FALLS IN-
DEMNITY COMPANY, a corporation,
Cross-Defendants.

UNITED STATES OF AMERICA, et al.,
Cross-Claimant,

vs.

WM. RADKOVICH COMPANY, INC., et al.,
Cross-Defendants.

JUDGMENT

The above entitled action came on for trial be-
fore the Court, without a jury, on May 17, 1951,
the plaintiff appearing by its attorney, Glen Behy-
mer; the defendants Wm. Radkovich Company, Inc.,
a corporation, United Pacific Insurance Company,
a corporation, General Casualty Company of Amer-
ica, a corporation, Excess Insurance Company of
America, a corporation, and Manufacturers' Cas-
ualty Insurance Company, a corporation, appearing
by Eldon V. McPharlin of Anderson, McPharlin &

Conners; defendant E. B. Woolley appearing by his attorney, Frank M. Benedict; and cross-defendant Glens Falls Indemnity Company, a corporation, appearing by John E. McCall and J. Harold Decker, and testimony having been offered and briefs filed and the Court having filed its Findings of Fact, Conclusions of Law and Order for Judgment and its Memorandum of Conclusions herein, now pursuant to said Order for Judgment,

It Is Hereby Ordered and Adjudged:

(1) That the plaintiff United States of America, at the relation of and to the use of Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of \$26,952.01, plus interest at the rate of 7% per annum on the sum of \$43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of \$26,952.01 for the period October 28, 1949, to the date of this Judgment, in the total sum of \$35,977.13.

(2) That defendant Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and [230] Manufacturers' Casualty Insurance Company have judgment over in like amount against Wm. Radkovich Company, Inc., defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company;

(3) That defendant E. B. Woolley have judgment against United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, Manufacturers' Casualty Insurance Company in the sum of \$15,249.69, which amount E. B. Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of said Wm. Radkovich Company and its Sureties, United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company;

(4) That E. B. Woolley have judgment against Wm. Radkovich Company, Inc., in the sum of \$949.22, which sum Glens Falls Indemnity Company may apply to diminish the amount, if any, paid by it under the judgment herein.

(5) That one-half the court costs, in amount of \$29.32, shall be borne by defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company and one-half by Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company.

Dated: February 7, 1952.

/s/ JACOB WEINBERGER,

United States District Judge [231]

[Endorsed]: Filed Feb. 8, 1952.

[Title of District Court and Cause.]

MINUTE ORDER

Glen Behymer, Frank M. Benedict, Anderson, McPharlin & Connors, John E. McCall and J. Harold Decker.

You are hereby notified that judgment has been docketed and entered this day in the above entitled case.

Dated: Los Angeles, California, Feb. 8, 1952.

EDMUND L. SMITH,
Clerk

/s/ By C. A. SIMMONS,
Deputy Clerk

[232-3-4]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To Westinghouse Electric Supply Company, a Corporation, and to its Attorney, Glen Behymer; Wm. Radkovich Company, Inc., a Corporation, and its Sureties, and their Attorneys, Anderson, McPharlin & Connors; and to E. B. Woolley and his Attorney, Frank M. Benedict:

You and Each of You Will Please Take Notice that on Monday, the 3rd day of March, 1952, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the above entitled Court, located on the 2nd Floor of the Federal Building, Los Angeles,

California, Cross-Defendant Glens Falls Indemnity Company will move the Court for an order setting aside the judgment herein and granting a new trial to the Glens Falls Indemnity Company, and for such other order or orders as may be meet and just.

Dated: February 18, 1952.

JOHN E. McCALL and
J. HAROLD DECKER,

/s/ By JOHN E. McCALL,

Attorneys for Cross-Defendant Glens
Falls Indemnity Company [236]

MOTION FOR NEW TRIAL

Now Comes Glens Falls Indemnity Company, Cross-Defendant in the above entitled cause, and moves this Honorable Court for an order setting aside the judgment herein against this Cross-Defendant and granting a new trial of the above entitled cause, for the following reasons:

1. Newly discovered evidence, documentary and oral, of material facts which existed at the time of the trial of this case, but which evidence was not discovered prior to the time of the trial, nor at the time of the trial, nor during said trial, by reason of excusable ignorance. Said evidence would materially affect the rights and liabilities of the parties in the above entitled action.

2. The judgment herein is against the law, and the Court was in error in holding that Glens Falls

Indemnity Company is liable to Wm. Radkovich Company, Inc., and its sureties, in that:

(a) Glens Falls Indemnity Company should be completely exonerated by reason of the following: On or about the 25th of September, 1947, the electrical subcontractor, E. B. Woolley, prepared a list of electrical materials in the total sum of \$9,885.37 (Glens Falls Exhibit 13) and on or about the 22nd of October, 1947, Woolley went to Radkovich and demanded payment of \$9,885.37 based on said statement of September 25, 1947. Radkovich denied that said \$9,885.37 was yet due but agreed to and [238] did pay Woolley \$5,000.00 on said statement. Woolley then stated to Radkovich that "he couldn't operate unless he got \$4,000.00 more." (Rep. Tr. p. 76, lines 3-4; Court's Memorandum of Conclusions, p. 26, lines 22-25). Said statement by Woolley that he could not continue performance under his subcontract without said additional \$4,000.00 payment constituted an act on the part of the Principal, E. B. Woolley, which required Radkovich, under the terms of the subcontract bond, to give immediate written notice of said act to this Cross-Defendant Surety, which Radkovich failed to do.

(b) Glens Falls Indemnity Company should be completely exonerated by reason of the following: On or about April 10, 1948, the plaintiff, Westinghouse Electrical Supply Company, gave written notice to Wm. Radkovich Company, Inc., that E. B. Woolley had not paid it a past-due account in the sum of \$43,514.05 for materials supplied and used

connection with Woolley's work provided for in the electrical subcontract (Findings of Fact, Par. II, p. 5, lines 3-8). The Obligee, Wm. Radkovich Company, Inc., failed to give this Cross-Defendant Surety written notice of said non-payment by Woolley until on or about June 10, 1948 (Radkovich's Exhibit "F"), whereby the said Wm. Radkovich Company, Inc., breached the condition precedent contained in the electrical subcontract bond requiring it to give the Surety such written notice "immediately".

(c) Glens Falls Indemnity Company should be completely exonerated by reason of the material additions to the electrical subcontract in excess of \$5,000.00 in labor and materials which were not required under said subcontract nor under any changes or modifications thereof, [239] but which were performed and supplied by the electrical subcontractor, E. B. Woolley, at the request of the prime contractor, Wm. Radkovich Company, Inc., (Findings of Fact, Par. XV, p. 6, lines 14-20).

(d) Glens Falls Indemnity Company should be completely exonerated by reason of the breach or breaches of the electrical subcontract by Wm. Radkovich Company, Inc., in that, among other things, it delayed the commencement and completion of Woolley's performance of said subcontract (Findings of Fact, Par. XVI, p. 7, lines 8-16; Court's Memorandum of Conclusions, p. 44, lines 5-9 and lines 28-31).

(e) Glens Falls Indemnity Company should be

completely exonerated in that the evidence shows that on or about October 22, 1947, Wm. Radkovich Company, Inc., paid E. B. Woolley \$4,000.00 under protest and before said payment was due under the terms of the electrical subcontract when Woolley stated he could not proceed with his subcontract unless he received said \$4,000.00. (Rep. Tr. p. 76, lines 3-4; Court's Memorandum of Conclusions, p. 26, lines 22-25).

(f) Glens Falls Indemnity Company should be completely exonerated by reason of the following: Between the time of E. B. Woolley's second statement for electrical materials, dated November 1, 1947, and his third such statement, dated November 24, 1947, (Glens Falls Exhibit 13), Wm. Radkovich Company, Inc., without the knowledge or consent of this Cross-Defendant Surety, materially altered the method of payment to E. B. Woolley from that provided for under the terms of the electrical subcontract (Rep. Tr. p. 237, lines 4-25; Court's Memorandum of Conclusions, p. 23, lines 3-8). [240]

3. The judgment herein is against the law and the Court was in error in holding that the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses (Findings of Fact, Par. XVIII, p. 8, lines 27-28).

This motion is based upon the affidavit of Ralph E. Ferguson, attached hereto as Exhibit "A", and the affidavit of John E. McCall, attached hereto as Exhibit "B", and upon all the files and records in said action.

Wherefore, Cross Defendant Glens Falls Indemnity Company moves that it may be granted a new trial in said cause upon a date certain to be fixed by the Court.

Dated: February 18, 1952.

Respectfully submitted,

JOHN E. McCALL and

J. HAROLD DECKER,

/s/ By JOHN E. McCALL,

Attorneys for Cross-Defendant Glens
Falls Indemnity Company [241]

Affidavit of Service by Mail attached. [246]

[Endorsed]: Filed Feb. 18, 1952.

Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's calendar, February 26, 1952.

It appearing that through a clerical error the judgment in the above entitled matter signed February 7, 1952, did not conform to the findings of fact and conclusions of law herein, in that the name Wm. Radkovich Company, Inc., was omitted from paragraph 3 at line 5 of said judgment and good cause appearing therefore,

It Is Ordered that said judgment is corrected so that the words Wm. Radkovich Company, Inc., are inserted at line 5 after the word against.

The clerk is ordered to make said correction by interlineation.

Copies to: John E. McCall, Esq., Eldon V. McPharlin, Esq., Frank M. Benedict, Esq.

Correction made Feb. 26, 1952.

EDMUND L. SMITH,

Clerk

By JOHN A. CHILDRESS,

Deputy

[250]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Feb. 27, 1952, at San Diego, Calif.

Present: The Honorable Jacob Weinberger, District Judge; Deputy Clerk J. M. Horn; Reporter Ross Reynolds.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Good cause appearing therefor,

It Is Ordered that the motion for new trial in the above-entitled matter be, and the same is continued for hearing to March 17, 1952, 2 p.m.

EDMUND L. SMITH,

Clerk

/s/ By J. M. HORN,

Deputy Clerk

[251]

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's calendar, March 6, 1952.

Good cause appearing thereof, It Is Ordered that the motion for new trial in the above entitled matter be and the same is continued for hearing to March 24, 1952, at 2:00 p.m., to be heard in the courtroom of the above entitled Court at San Diego, California.

Copies to: John E. McCall, Esq., Eldon V. McPharlin, Esq., Frank M. Benedict, Esq. [252]

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's calendar, March 17, 1952.

It appearing that the motion for new trial filed by Glens Falls Indemnity Company has been set for March 24, 1952, at 2:00 p.m. and it further appearing that no argument is necessary on said motion,

It Is Ordered said motion will on said date be submitted without argument.

It Is Further Ordered that any counsel desiring to file a brief on said motion may do so on or before said date.

Copies to: John E. McCall and J. Harold Decker, Esqs., Eldon V. McPharlin, Esq., Frank M. Benedict, Esq. [253]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: March 24, 1952, at San Diego, Calif.

Present: The Honorable Jacob Weinberger, District Judge; Deputy Clerk J. M. Horn; Reporter Ross Reynolds.

Counsel for Plaintiff: Glen Behymer (no appearance) for plf ex rel.

Counsel for Defendant: No appearance.

For submission of motion for new trial.

Ordered: continued to April 15, 1952, 10 a.m., for submission.

EDMUND L. SMITH, Clerk,

/s/ By J. M. HORN, Deputy Clerk [254]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 15, 1952, at San Diego, Calif.

Present: The Honorable Jacob Weinberger, District Judge; Deputy Clerk John M. Horn; Reporter Ross Reynolds.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

For submission of motion for a new trial.

It Is Ordered that the cause stand submitted.

EDMUND L. SMITH,
Clerk

/s/ By J. M. HORN,
Deputy Clerk

[255]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW
TRIAL

A motion for new trial was filed herein by the Glens Falls Indemnity Company, a corporation. Affidavits and briefs in support of said motion and in opposition thereto were filed by respective counsel, who submitted said motion without argument.

The grounds for said motion are that new evidence has been discovered and that the judgment rendered by the Court is against the law.

While it is the Court's view that the so-called evidence set out in the brief of Glens Falls Indemnity could have been discovered prior to or during the trial had reasonable diligence been used, the evidence is not such as would materially affect the rights and liabilities of the parties in the above entitled action.

With reference to the matters set forth by counsel for Glens Falls Indemnity in his brief as errors of law, the Court has carefully re-examined its opinion filed herein, and has noted, as pointed out by counsel for Radkovich and Sureties in his brief on said

motion, that such matters were subject to distinct and separate findings [256] of the Court. The cases cited by counsel for Glens Falls Indemnity Company were, for the most part, considered by the Court in rendering its opinion; we find nothing in the record on the motion for new trial to lead us to adopt contrary views.

The motion for new trial is denied.

Dated this 10th day of June, 1952.

/s/ JACOB WEINBERGER,
United States District Judge [257]

[Endorsed]: Filed June 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Glens Falls Indemnity Company, Cross-Defendant above named, hereby appeals to the United States Court of Appeals, for the Ninth Circuit, from the final judgment entered in this action on June 10, 1952.

Dated: July 7, 1952.

JOHN E. McCALL and
J. HAROLD DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Appellant and Cross-Defendant Glens
Falls Indemnity Company. [257-b]

Affidavit of Service by Mail attached. [257-c]

[Endorsed]: Filed July 7, 1952.

[Title of District Court and Cause.]

STIPULATION FOR EXTENDED TIME FOR
DESIGNATION OF RECORD AND FOR
DOCKETING AND FILING RECORD ON
APPEAL

Whereas, counsel for appellant, John E. McCall and J. Harold Decker, have associated with them for the purposes of appeal Albert Lee Stephens, Jr.; and

Whereas, it is necessary to allow sufficient time for said associate counsel to become familiar with the records, papers and pleadings in the above entitled action; and good cause appearing therefor

It Is Hereby Stipulated by and between counsel of record for the respective parties as follows:

I.

The time within which the record on appeal shall be designated and the case docketed in the Court of Appeals is hereby extended to the 15th day of September, 1952, being a total of 70 days from the date of filing Notice of Appeal.

II.

Appellant shall have to and including August 8, 1952 to designate the record on appeal.

III.

Respondents shall have 20 days after the service and filing of such designation of the record on ap-

peal by appellant to serve and file a designation of additional portions of the record, proceedings and evidence to be included in the record on appeal.

IV.

The foregoing stipulation is subject to order of court and the parties hereto expressly waive notice.

Dated: July 22, 1952.

ANDERSON, McPHARLIN &
CONNERS,

/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants and Cross-
Claimants [261]

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant E. B.
Woolley

/s/ GLEN BEHYMER,
Attorney for Plaintiff

JOHN E. McCALL and
J. HAROLD DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Glens Falls Indemnity
Company

It Is So Ordered.

/s/ JACOB WEINBERGER,
Judge [262]

[Endorsed]: Filed Aug. 6, 1952.

[Title of District Court and Cause.]

STIPULATION FOR FURTHER EXTENSION
OF TIME FOR DESIGNATION OF REC-
ORD AND FOR DOCKETING AND FIL-
ING RECORD ON APPEAL

Whereas, by inadvertence the Reporter's Transcript of Testimony has not been completed; and

Whereas, additional time is necessary to obtain the remainder of the Reporter's Transcript; and

Whereas, the Clerk will need sufficient time to thereafter complete certification of the record; and

Whereas, counsel for all parties to the appeal desire to have available the exhibits introduced in evidence for their further inspection;

Now Therefore, It Is Hereby Stipulated by and between counsel of record for the respective parties as follows:

I.

The time within which the record on appeal shall be designated and the case docketed in the United States Court of Appeals is hereby extended to the 5th day of October, 1952, being a total of 90 days from the date of filing of Notice of Appeal.

II.

The foregoing stipulation is subject to order of Court and the parties hereto expressly waive notice.

Dated: September 11, 1952.

ANDERSON, McPHARLIN &
CONNERS,

/s/ By KENNETH E. LEWIS,
Attorneys for Defendants and Cross-
Claimants

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant E. B.
Woolley

/s/ GLEN BEHYMER,
Attorney for Plaintiff [277]

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Glens Falls Indemnity
Company

It Is So Ordered. 9/12/52.

/s/ PAUL J. McCORMICK,
Judge [278]

[Endorsed]: Filed Sept. 12, 1952.

In the United States Court of Appeals
for the Ninth Circuit

No. Undocketed

GLENS FALLS INDEMNITY COMPANY, a
Corporation,

Appellant,

vs.

WM. RADKOVICH COMPANY, INC, a Cor-
poration, et al.,

Appellee.

PETITION FOR EXTENSION OF TIME FOR
DESIGNATION OF RECORD AND FOR
DOCKETING AND FILING RECORD ON
APPEAL

To: The Honorable Chief Judge of the United
States Court of Appeals for the Ninth Circuit:

Petitioner Glens Falls Indemnity Company, a cor-
poration, cross-defendant in the above captioned
action, respectfully shows:

Judgment was rendered against petitioner in the
United States District Court for the Southern Dis-
trict of California and petitioner has filed Notice
of Appeal on the 7th day of July, 1952. Petitioner
filed its designation of the entire record. However,
thereafter it was discovered that a portion of the
testimony taken at the trial had not been tran-
scribed by the reporter. This was immediately
[280] ordered from the reporter and is now in pro-

cess of preparation, but has not been delivered to the Clerk of the District Court or to counsel. The undersigned has been associated in the case for the purpose of appeal and did not engage in the trial of the action and consequently is unfamiliar with the contents of the portion of testimony not yet transcribed.

The time within which the appeal must be docketed in this court has been extended by the District Court to and including the 5th day of October, 1952, being 90 days from the date of filing Notice of Appeal and the District Court has no power to further extend the time for docketing the appeal. Additional time is necessary to enable the transcript of testimony to be prepared and filed and to be examined by counsel and to enable the undersigned counsel for appellant to become familiar therewith so that he may prepare the points upon which appellant intends to rely and a designation of record material to the consideration of the appeal. After the record is transmitted to this court, it will no longer be possible for counsel to inspect exhibits and further inspection thereof is necessary. It is also necessary for the Clerk of the District Court to have time enough to prepare and certify the record.

This petition is made and based upon the allegations contained herein and the Affidavit of Albert Lee Stephens, Jr., attached hereto.

Wherefore, petitioner respectfully requests that [281] the time within which the appeal must be

docketed in this court be enlarged and extended for 30 days from the 5th day of October, 1952.

Dated: October 2, 1952.

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR and
ALBERT LEE STEPHENS, JR.,

/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellant Glens Falls
Indemnity Company

So Ordered:

WILLIAM HEALY,
Circuit Judge

State of California,
County of Los Angeles—ss.

Albert Lee Stephens, Jr., being duly sworn, deposes as follows:

I am one of the attorneys of record for Glens Falls Indemnity Company which has appealed from a judgment of the United States District Court for the Southern District of California by filing Notice of Appeal dated July 7, 1952. I have read the petition of Glens Falls Indemnity Company, to which this affidavit is attached, and know the contents thereof. All of the statements therein contained are true and for the reasons stated therein it is imperative that the time within which said appeal must be docketed be extended and enlarged as requested.

Otherwise the rights of the petitioner will be seriously and materially prejudiced.

/s/ ALBERT LEE STEPHENS, JR.

Subscribed and sworn to before me this 2nd day of October, 1952.

[Seal] /s/ CATHERINE C. WILLIAMS,
Notary Public in and for the County of Los Angeles, State of California. [283]

[Endorsed]: Filed Oct. 3, 1952. Paul P. O'Brien, Clerk. [282]

[Endorsed]: Filed Oct. 6, 1952. Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 286, inclusive, contain the original Complaint; Summons and Returns of Service; Motion to Bring in Third Party Cross-Defendant; Cross-Claim; Order Granting Leave to Serve Third Party; Answer of Defendants United Pacific Insurance Company et al to Complaint; Answer of Defendant Wm. Radkovich Company, Inc. to Complaint; Answer of E. B. Woolley to Complaint; Answer of Cross-Defendant Glens Falls Indemnity Company to Cross-Claim; Answer of Cross-Defendant E. B. Woolley to Cross-Claim; Cross-Claim

Upon Bond and Against Contractor for Materials and Labor Upon Government Contract; Copy of Letter dated Sept. 21, 1949 from Clerk of District Court to Counsel; Answer of Cross-Defendant Wm. Radkovich Company to Cross-Claim of E. B. Woolley; Answer of Cross-Defendants United Pacific Insurance Company et al to Cross-Claim; Copies of Letters dated Dec. 29, 1949 and May 4, 1950 from Clerk of District Court to Counsel; Stipulation and Order Extending Time for Filing of Opening Brief; Stipulation and Order for Filing Supplement and Amendment to Cross-Claim; Supplement and Amendment to Cross-Claim; Stipulation and Order Extending Time for Filing of Reply Brief of Wm. Radkovich Company Inc., and its Sureties; Stipulation and Order for Extension of Time for Filing of Reply Brief of Cross-Claimant E. B. Woolley; Order Transferring Case Pursuant to Rule 2; Stipulation and Order for Amendment of Cross-Claim, etc.; Memorandum of Conclusions; Minute Orders of Sept. 26, 1951, and Oct. 9, 1951; Memorandum re Proposed Findings, Conclusions and Judgment and Objections Thereto with Attached Documents; Findings of Fact and Conclusions of Law; Judgment; Copy of Notice of Entry of Judgment; Motion for New Trial with Notice of Motion, Points and Authorities and Exhibits; Minute Order of Feb. 26, 1952; Minutes of the Court for Feb. 27, 1952; Minute Orders of March 6 and 17, 1952; Minutes of the Court for March 24 and April 15, 1952; Order Denying Motion for New Trial; Notice of Appeal; Stipulation and Order Fixing

Amount of Supersedeas Bond; Stipulation and Order Extending Time to File Record and Docket Appeal; Designation and Counter-Designation of Record on Appeal; Stipulation and Order for Further Extension of Time for Designation of Contents of Record on Appeal and for Docketing and Filing Record on Appeal; Certified Copy of Petition for and Order Extending Time for Designation of Contents of Record on Appeal and for Docketing and Filing Record on Appeal entitled in Court of Appeals; and Stipulation for Supplemental Designation of Record which, together with original Radkovich and Sureties Exhibits A to M, inclusive, and Woolley and Glens Falls Indemnity Co. Exhibits 1 to 14, inclusive, and Reporter's Transcript of Proceedings on May 17, 18, and 19, 1950, and January 26, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 31st day of October, A.D. 1952.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court, Southern District of California, Central Division

No. 9303-Y-Civil

[Title of Cause.]

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, Calif., Wednesday, May 17, 1950

Honorable Jacob Weinberger, Judge Presiding.

Appearances: For the Plaintiff: Glenn Behymer, Esq. For Defendants, Cross Complainants, and Cross Defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, Manufacturers' Casualty Insurance Company: Messrs. Anderson, McPharlin & Conners, by Eldon V. McPharlin, Esq. For Defendant, Cross-Defendant, and Cross-Complainant E. B. Woolley: Frank M. Benedict, Esq. For Cross Defendant Glens Falls Indemnity Company: John E. McCall, Esq., and Harold S. Decker, Esq. [3*]

(Case called for trial by the clerk.)

Mr. Benedict: For the purpose of the record, I might state that the defendant Woolley is also a cross-claimant in this matter as well as the defendant.

The Court: I have read the briefs that are on

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

file, that is to say, the trial memoranda. Are there any preliminary statements to be made now defining the issues?

I imagine the first issue to be determined is whether or not these materials were extras or they were required by the contract. That is the principal controversy, isn't it, insofar as the subcontractor is concerned?

Mr. Benedict: I might say this, your Honor, that not necessarily these claims that are involved in this matter but the action, of course, is instituted by Westinghouse to recover some \$43,000 for materials which Woolley admits were furnished him, the subcontractor.

The Court: No one disputes the validity of the Westinghouse claim, is that correct?

Mr. Benedict: It is my understanding that we do not. We certainly do not. Woolley does not dispute it.

Mr. Behymer: There is only one thing that should be added to the court's remark in regard to that, and that is, that since the action was filed on November 1, 1949 there has [4] been paid on account to Westinghouse the sum of \$16,562.04.

The Court: Yes; I understand that. These papers show that. But the claim of the Westinghouse company is not disputed, is it?

Mr. Behymer: I understand it is not disputed. I understand from Mr. McPharlin, however, he wanted a statement made by the subcontractor and his surety that it is not disputed, before he would join in a stipulation with respect to that matter.

Mr. McPharlin: In reference to that, I represent the prime contractor and its sureties. We have, of course, no knowledge of the dealings between the subcontractor and Westinghouse. If the subcontractor and the subcontractor's surety company wish to stipulate that these materials were furnished them and used in that construction on this work, why, I will accept that stipulation.

Mr. Benedict: We so stipulate.

Mr. McCall: The surety for the subcontractor will join in the stipulation, because we are taking the word of the principal that the material was furnished for and went into that job.

The Court: What is the amount claimed?

Mr. Behymer: The amount that is claimed—

The Court: Which you stipulate is going to Westinghouse?

Mr. Behymer: The amount that is claimed is a balance of [5] principal, after that occurred which I refer to, of \$26,952.01, interest on \$43,514.05—

The Court: Pardon me. \$26,900 and what?

Mr. Behymer: \$26,952.01; that is after the application of the payment on account of the principal; also interest on \$43,514.05 from April 10, 1948 to November 1, 1949, and interest on the balance—

The Court: That is at 7 per cent, is it?

Mr. Behymer: Yes.

The Court: That is the rate, 7 per cent?

Mr. Behymer: That is the legal rate.

Mr. Benedict: The legal rate.

Mr. Behymer: And interest on the balance of \$26,592.01 from November 1, 1949—

The Court: \$26,952.01 from when?

Mr. Behymer: From November 1, 1949, the date of the payment of the \$16,000-odd.

The Court: Any dispute as to the interest? Is there any dispute as to the interest?

Mr. McCall: Your Honor, I do not know. I have just asked my associate here, Mr. Decker, whether he knew whether or not it was entitled to interest under the law, and he does not know, either. So it seems to me that we will have to check the law, unless the court already knows it.

Mr. Behymer: I submit that the obligation is the same as [6] the obligation of the principal. The obligation of the surety is the same as the obligation of the principal.

The Court: If there was a set time for the payment of the principal and it was not paid at that time, I imagine it would draw interest.

Mr. Behymer: It is alleged, and I understand that it is not denied now, that under the terms of the contract the merchandise purchased was payable on the 10th of the month next succeeding the month of delivery. The last delivery on the contract was in the month of March, 1948. That made the interest run from April 10, 1948. There would have been interest on varying balances prior to that date. We have not prayed for that item. We have prayed only for interest on the whole balance from the 10th of the month next succeeding the last delivery. The account started to run, the first delivery was in November of '47, and the deliveries were

between November, December, January, February, and March.

The Court: I imagine your contract and your invoices show everything with respect to due dates.

Mr. Behymer: I can call Mr. Woolley to testify but, as I understand, it is not necessary to establish that because the law would imply interest from the date of completion or performance of the contract in any event.

The Court: I think it would. I am just wondering if you gentlemen would care to stipulate, after you have [7] examined your invoices and your contract, if you are satisfied as to the dates.

Mr. Behymer: They are all set up in detail in the complaint itself, the times of delivery and the amounts and the items. Really, it is in the nature of a bill of particulars.

Mr. McCall: We understand, your Honor, that Mr. Woolley states that these accounts are payable on the following month, the 10th.

The Court: On the month following the delivery, is that correct?

Mr. McCall: Yes, sir.

The Court: Before the 10th?

Mr. McCall: By the 10th, anyway.

The Court: By the 10th.

Mr. Behymer: And that is all we are praying for.

The Court: That is the way your claim is set up?

Mr. Behymer: That is correct.

Mr. McCall: As I understand it, the Westinghouse suit, represented by Mr. Behymer, is the only one here that is under the Miller Act—no. I pre-

sume the cross complaint of the subcontractor is under the Miller Act. Now, the cross claim——

The Court: Pardon me, before you go into that. May we clean up this interest matter?

Mr. McCall: Oh, I was thinking that was cleared up, your Honor. [8]

The Court: I just wondered if everybody agrees that that is the situation; that the stipulation was that interest from the date stated in the complaint with the particulars as set out, if you gentlemen are prepared to stipulate that is correct.

Mr. Behymer: I, of course, offer to so stipulate.

Mr. Benedict: I think the stipulation should be based on Mr. Behymer's statement, because of the payment on November 1st. He stated the way the interest would run, and I will so stipulate, based on that statement.

The Court: If you will make a statement in that respect?

Mr. Behymer: Well, I have just made it. The statement is that the amount in principal is \$26,952.01; that interest runs from April 10, 1948 to November 1, 1949 at the legal rate on \$43,514.05; that there was paid on November 1, 1949, \$16,562.04; and that from November 1, 1949, the interest is to be calculated on the balance then remaining of \$26,952.01.

Mr. Benedict: So stipulated.

Mr. McCall: So stipulated by the surety for the subcontractor, Glens Falls.

Mr. McPharlin: So stipulated by the prime contractor and sureties.

Mr. Behymer: I believe that I would then like to be excused from further attendance on the trial, because I am not interested in the balance of the controversy. [9]

The Court: You are not interested possibly in the discussion of your records as to any of these bonds, if you claim any——

Mr. Behymer: Our action in this case is only against the subcontractor who directly incurred the obligation, Mr. Woolley.

The Court: And on his bond?

Mr. Behymer: Against the general contractor, as principal, on the Miller Act bond, and against the four surety companies on the principal's bond, the four surety companies represented by Mr. McPharlin.

I did not join in our action on the main action the surety on the subcontractor's bond. It is not a defendant in my action.

The Court: Does that satisfy the appearance of counsel?

Mr. McCall: It does insofar as the surety for Mr. Woolley, the subcontractor.

The Court: Yes.

Mr. McPharlin: Yes. Mr. Behymer has made a correct statement of the pleadings, your Honor.

Mr. Behymer: There is one other thing before I ask to be excused. Some of you gentlemen asked me to present today this contract and bond. Do you want me to introduce it into evidence?

Mr. McCall: I might state that after the court made the [10] suggestion yesterday that all the at-

torneys get together and decide on the exhibits, we did that very thing, and we have all agreed upon the exhibits we have prepared. We can hand them in in any order that the court may suggest.

The Court: Very well. You have a claim, that is, you referred to a claim as to the bond of the general contractor, is that correct?

Mr. Behymer: Against the general contractor, as the principal on that bond, and against the four co-sureties, as sureties on that bond.

The Court: Are there any defenses set up by the insurance companies in relation to this matter as affecting the Westinghouse?

Mr. McCall: Your Honor means the insurance companies for the prime contractor?

The Court: For the prime contractor.

Mr. McPharlin: Insofar as the prime contractor is concerned and their answer to the Westinghouse claim, they have denied that on the basis of lack of information.

The Court: I am sorry, I can't hear you.

Mr. McPharlin: The claim of Westinghouse has been denied by the prime contractor and its sureties, in the pleadings, on the basis of lack of information or belief. Now, since we have accepted that stipulation, there is no further defense to the claim of Westinghouse. [11]

The Court: That is the prime contractor. Now, what about the sureties?

Mr. McPharlin: And that is true of the sureties, also.

The Court: Also, of the sureties.

Mr. McPharlin: Yes. And I think our next step now, of course, is between the prime contractor and its sureties and the subcontractor and his sureties.

The Court: Very well.

Mr. Behymer: Do you want me to present these documents or will you gentlemen present them?

Mr. McPharlin: I think we can present them.

Mr. Behymer: All right. With that understanding, may I be excused?

The Court: So far as the court is concerned, if you have nothing further here. We may notify you later in the event something develops.

Mr. Behymer: All right. But I feel that I am showing our title to a judgment, and the controversy really is between other actors.

The Court: I see.

Mr. Behymer: But I will come at any time that I am sent for, gentlemen and the court.

Mr. McCall: Before Mr. Behymer gets away, might I make this observation and see if my understanding is correct? It is now my understanding that since the claim of Mr. Behymer's [12] client has been stipulated to, there is nothing further before the court under the Miller Act; that leaves only the suit of Radkovich Company, the prime contractor, against the subcontractor, represented by Mr. Benedict, and the suit of the prime contractor and its sureties against the subcontractor's sureties. Of course, none of that could be under the Miller Act and will not be controlled, as I understand it, by any phase of the Miller Act.

Mr. McPharlin: No. I believe Mr. McCall over-

looked that the cross-claim of the subcontractor against the prime contractor is under the Miller Act, I believe.

Mr. Benedict: That is correct, your Honor. Our claim is based on the Miller Act.

Mr. McCall: That is correct. I misstated that, your Honor. I overlooked it.

The Court: The cross-claim of the subcontractor against the prime contractor?

Mr. McPharlin: Yes, your Honor.

The Court: For the balance claimed to be due, that is to say, damages, etc?

Mr. McPharlin: Yes.

The Court: All in connection with the Miller Act?

Mr. McPharlin: All in connection with the Miller Act, yes; and, of course, the whole action is connected with the Miller Act, because all parties here are claimants and cross-claimants. [13] This is one action.

The Court: I take it your distinction is that part of it will be regulated by the Act and part of it by the state law; is that your thought?

Mr. McCall: That is right, your Honor; yes, sir.

The Court: Do you agree to that?

Mr. Behymer: As far as I am informed, the only person I have any right of action against under the state law is the subcontractor on his contract. As far as my recovery against the general contractor and its sureties, it must be under the Miller Act.

The Court: Your claim was filed under the Miller Act, was it not?

Mr. Behymer: It was filed, and it has been stipulated that it was properly filed and that the monies are owing; so that ends it as far as my client is concerned.

The Court: Yes; all right.

Mr. McPharlin: I do not believe the statement is entirely true that we are concerned only with the state law.

Cases under the Miller Act—there are a number of cases concerning the subcontractors' bonds, also, where the Federal Courts have ruled as to the interpretation of the subcontractor's bond and applied the same rules of liberality to the subcontractor's bond as they have to the prime contractor's bond under the Miller Act. So I think that we have that [14] same situation here.

The Court: There is no contention that this court does not have jurisdiction of the entire matter, is there?

Mr. McCall: None at all, none at all. It is our position, the position of the surety for the subcontractor, that that is not under the Miller Act but is controlled by the state law.

The Court: Yes.

Mr. Behymer: Now, may I depart?

(Mr. Behymer left the courtroom.)

Mr. McPharlin: If the court please, counsel for the remaining parties here have gone over a number of documents and agreed that they will be or may be admitted into evidence. There are quite a number and I do not know just what procedure the court would like for us to follow. But we have

the contracts, the bonds and correspondence between the parties.

I wonder if it would meet with the court's approval if we introduced all of the documents that we have agreed to at this time.

The Court: Any objection?

Mr. McCall: It seems to me that that would save time, your Honor, for the cross claimants to introduce their documents, and then the rest of us introduce our exhibits, and we will have a list of them, then we can refer to them later on.

The Court: All right; any order that you wish may be [15] followed.

Mr. McPharlin: The cross-complainant——

The Court: May I suggest this: Instead of using the word "cross-complainant", suppose you use the name of the entity involved, because we have so many cross-actions one way and another that we may have a little confusion.

Mr. McPharlin: May I refer to the prime contractor and its sureties, instead of naming the four sureties, your Honor?

The Court: Yes. The prime contractor, of course, is the Radkovich Company.

Mr. McPharlin: Is the Radkovich Company.

The Court: You may use the name. I think you had better just say "Radkovich Company and sureties."

Mr. McPharlin: In behalf of the Radkovich Company and its sureties I offer into evidence, first, the agreement by the parties authorizing the payment of \$16,562.54 to the Westinghouse Company.

The Clerk: That will be Radkovich et al. Exhibit into evidence.

The Court: You mean with whom, now, for my notes?

The Clerk: Mr. McPharlin.

Mr. McPharlin: Yes, sir.

The Clerk: Do you wish to call the court's attention to the agreement?

The Court: Agreement with whom, so I may have it in my [16] notes?

Mr. McPharlin: This is a document addressed to Wm. Radkovich Company, Inc. and its sureties, requesting and authorizing them to pay to Westinghouse Electric Supply Company the sum of \$16,625.54, which was the amount that Radkovich and his sureties admitted was due and owing to Woolley under his subcontract. This is executed by Woolley and his attorney, by Woolley's surety and the surety company's attorney.

The Court: That authorized the payment of the \$16,000?

Mr. McPharlin: Yes, your Honor.

On behalf of Radkovich and his sureties I offer into evidence a document entitled "Contract No. W-04-353-ENG-2050 Construction Contract War Department". This is the contract, the prime contract, between Wm. Radkovich Company and the United States Government for this work. This document contains the prime contract, also the plans and specifications, the change orders, consisting of two change orders, copies of the payment and per-

formance bonds posted with the Government by the Radkovich Company.

The Clerk: That will be said Defendants' Exhibit B into evidence.

The Court: It will be received.

Mr. McPharlin: I next offer into evidence a document entitled "Sub-Contract re War Department Construction". This [17] is a subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley, dated July 30, 1947, which is the subcontract with which we are here involved.

Also attached to this document is the Performance Bond No. 320853 and the Payment Bond of the same number, executed by the Glens Falls Indemnity Company to Wm. Radkovich Company, Inc., as obligee. This is the performance and payment bond executed by the Glens Falls Indemnity Company in reference to the subcontract of E. B. Woolley.

The Court: Exhibit C?

The Clerk: Yes, your Honor; Defendants' Exhibit C into evidence for the Radkovich Company and sureties.

Mr. McPharlin: I offer next into evidence a number of documents which I would like to offer as one exhibit. These are on the letterhead of Wm. Radkovich Company, Inc., and are entitled "Equipment Rental and Back Charge Report". These documents consist of the back charges of Radkovich Company against E. B. Woolley.

The Clerk: Admitted, your Honor?

The Court: They may be received.

The Clerk: They will be Radkovich's and sureties' Exhibit D into evidence.

The Court: That last one has to do with some electrical equipment claimed to have been furnished by the Radkovich Company, is that correct? [18]

Mr. McPharlin: Yes, your Honor.

Mr. Benedict: Well, not altogether, your Honor. It includes that, plus a lot of other back charges.

The Court: Other back charges?

Mr. Benedict: Yes. Some of those back charges we concede and furnished Mr. McPharlin with a list of those that we do concede. It might be well to introduce that.

Mr. McPharlin: Do you have an extra copy?

Mr. Benedict: I can furnish you with another one. I do not have it. You can introduce that into evidence and shorten the matter by indicating the ones that we concede, if that is agreeable to the court. A lot of those back charges we do not concede, however.

Mr. McPharlin: In reference to the back charges, the back charges claimed by Wm. Radkovich Company, your Honor, total \$7,887.09.

The Court: And you concede how much of that, or do you know?

Mr. Benedict: Would you read that off, Mr. McPharlin?

Mr. McPharlin: The subcontractor admits that the sum of \$2,213.53 is proper and is conceded as a proper back charge.

Does the surety of Woolley also admit to the

propriety of the back charges that Woolley has conceded?

Mr. McCall: Yes; that is, the Glens Falls, surety for the subcontractor, will admit all of those that Mr. Woolley [19] through his counsel has admitted.

Mr. McPharlin: I will offer that next into evidence, the back charges which are conceded by the subcontractor.

Mr. McCall: Your Honor, I do not know whether it is proper for us to have a stipulation to the effect that, while we do not any of us object to the exhibits that we are putting in, I think none of us should be bound by those exhibits. In other words, we do not admit the facts in those exhibits.

The Court: Insofar as the Glens Falls is concerned, the insurance company, you do not wish to admit liability?

Mr. McCall: That is right.

The Court: But, with that exception, you do apparently agree that the figures are correct, without admitting your liability; is that your position?

Mr. McCall: I am not sure we can go that far, but I do not think, in fairness to all of us here before the court, that any of us should be bound by any of the exhibits offered into evidence by the others.

The Court: At any rate, they are your exhibits and you are offering them. Now, what about objection on your part?

Mr. McCall: Oh, to save time, we are not objecting to the offer.

The Court: You are not objecting to this offer,

it reserve your rights to contest whatever they may show?

Mr. McCall: The facts. [20]

The Court: Yes.

Mr. McCall: Or the law.

The Court: Does that satisfy your offer?

Mr. McPharlin: I am not quite clear. Insofar as our stipulation here in reference to exhibits, it is that they are admissible and are what they represent to be, and they are admitted as evidence.

The Court: Well, let us start all over again. You have filed Exhibit D, which shows the back charges of \$7,887.09. This Exhibit E is an admission by the subcontractor, your subcontractor—

Mr. McCall: Yes, your Honor.

The Court: —of \$2,213.53 being proper, a proper charge against the subcontractor.

Mr. McCall: Yes.

The Court: So would not the surety, Glens Falls, take the same position?

Mr. McCall: Yes; as to that. But as to the balance of the \$7,000 and something we deny that as being proper.

The Court: There is no admission that I know of as to the balance. It is merely an offer to establish the case by his exhibits.

Mr. McCall: Yes. So that the fact we are not objecting, any of us, as we go along does not mean that we are willing to be bound by the various exhibits introduced by the other. [21]

The Court: But you are bound, however, by the admission of \$2,213.53 as a proper charge?

Mr. McCall: Yes.

The Court: But you do not admit the balance?

Mr. McCall: And not bound by anything except what we admit as we go along.

The Court: I understand. Do you understand that?

Mr. McPharlin: No; not quite, your Honor.

The Court: Let us clear that up if it is not clear.

Mr. McPharlin: I refer now to the prime contract and the prime contractor's bond and the specifications and change orders. I believe that these are Exhibit No. 2. Does counsel—

The Court: There is a controversy here as between the prime contractor and the subcontractor as to this electrical equipment which the subcontractor claims are extras. That, of course, you do not admit. The subcontractor does not admit validity of the back charge on that item, is that correct?

Mr. Benedict: Well, no, we do not, your Honor. In fact, I think that is contained in some of those back charges that we dispute.

The Court: Yes.

Mr. Benedict: It seems to me, your Honor, that all we are really doing here by our stipulation regarding the exhibits is taking a short cut; that we are not objecting to the [22] exhibits, and if the exhibits were presented with foundations being laid in the regular way, the other party is never bound, except as he has admitted, as we have here in this one instance, if he wants to dispute the correctness of any of the items. I think the same thing is here. All we are doing is really waiving any foundation

being laid and we are not asking for the best evidence or anything of that kind, and we are permitting these to go in. If none of us introduced any evidence in contradiction of what has been introduced, why, the record is there. That seems to me to be the only effect of what we are doing. Perhaps I am wrong.

The Court: You are acting as a sort of spokesman in relation to these exhibits, aren't you? You are not establishing your own case right now. You are offering their exhibits.

Mr. McPharlin: Yes, your Honor.

The Court: I presume you people went over them and you agreed that these are the exhibits that may be received or that may be offered.

Mr. McPharlin: Yes, sir.

The Court: You do have a claim of some kind here that you are asserting.

Mr. McPharlin: Yes, your Honor.

The Court: And so is the subcontractor asserting a claim.

Mr. Benedict: Yes, your Honor; that is right, definitely.

The Court: You are now asserting a claim in behalf of [23] the prime contractor?

Mr. McPharlin: The prime contractor and its sureties on the cross-claim against the subcontractor and his surety.

The Court: That is, you are trying to establish now your claim of some five odd thousand dollars?

Mr. McPharlin: No, no, your Honor. On this the the action was instituted against the prime contrac-

tor and its sureties by Westinghouse, the supplier which had supplied the material to the subcontractor.

The Court: Westinghouse is out now.

Mr. McPharlin: Yes. We answered that and that has been disposed of. The prime contractor and its sureties filed a cross-claim against the subcontractor and his surety in which they prayed the court that if judgment were entered against the prime contractor and its sureties for these materials furnished to Woolley, the subcontractor, then the prime contractor and its sureties in turn be granted judgment over against the subcontractor and his surety in the same amount.

Now it appears that Westinghouse will obtain its judgment for some \$26,000 plus interest that they have asked for, and if that judgment is granted against the prime contractor and its sureties, they now pray judgment over in the same amount against their subcontractor who was primarily responsible for those matters, and the subcontractor's surety which executed the bonds on behalf of the subcontractor. [24]

After that cross-claim by the prime contractor and its sureties against the subcontractor, then in the pleadings the subcontractor answered that, and then also came back with a cross-claim against the prime contractor and its sureties wherein the subcontractor claims that he still has money coming under the contract.

The Court: Doesn't the prime contractor admit owing the subcontractor so much, and doesn't he

state that he cannot pay it because of the claims that have been filed?

Mr. McPharlin: Yes; in the original answer we admitted owing the subcontractor \$16,000 something.

After this matter was at issue and prior to the trial, the subcontractor and his surety gave the prime contractor a written direction to pay to Westinghouse, on behalf of the subcontractor, the amount that the prime contractor admitted was due and owing to the subcontractor. So that full amount that the prime contractor admitted was due and owing to the sub has now been paid over to the sub's material supplier. So it is now the position of the prime contractor and its sureties that they have paid the subcontractor in full on his subcontract.

The Court: I see. Very well, do you gentlemen understand that to be the situation?

Mr. Benedict: Yes; that is substantially correct. And I might just take it from there, your Honor. The subcontractor's [25] position is that he has more coming than \$16,000 under the contract; that he also has some \$8,000 coming in extras, and he also is entitled to additional money for damages for delay. That constitutes our cross-claim against the general contractor.

The Court: How does the prime contractor make his claim against the subcontractor?

Mr. McPharlin: The prime contractor makes his claim against the subcontractor on this basis: He has paid the subcontractor in full.

The Court: In full. And I understand that if there is a judgment in favor of the Westinghouse

people, you want that to be charged back to the subcontractor?

Mr. McPharlin: Yes; to the subcontractor.

The Court: And the surety?

Mr. McPharlin: And his surety.

The Court: Otherwise you claim you do not owe him anything?

Mr. McPharlin: Yes; that is correct, your Honor.

The Court: Is that your position?

Mr. McPharlin: Yes.

Mr. Benedict: I believe that is the position, your Honor; yes.

The Clerk: Your Honor, do I understand that Radkovich's Exhibit E is in evidence? [26]

The Court: Exhibit E is in evidence.

Mr. McPharlin: Now, your Honor, both sides have agreed to numerous letters and correspondence which may be admitted into evidence. I have a number of letters here and counsel for the other side also have a number that they will introduce.

I was wondering now whether or not we could save time by handing in these documents, without the necessity of reading them into the record or, rather, we should read all of these letters into the record.

Mr. McCall: It seems to me that at least the dates of the letters and to whom they are addressed and by whom should be read into the record.

The Court: This is the correspondence had between all concerned, is that correct?

Mr. McPharlin: Yes, your Honor.

The Court: So they will be combined exhibits of all the parties?

Mr. McCall: Yes.

The Court: But you want them identified by a date and by the author and to whom they are addressed?

Mr. Benedict: That might be well, your Honor, because I might be duplicating here on some of those they are going to put in.

Mr. McPharlin: Very well, your Honor. I will offer [27] these, I believe, as a group. I have them clipped together, but I will identify letters that are in the group.

Mr. Benedict: All I want—I have some here, too, and I am not certain whether we have the same ones or not. There is no use of taking up the time of the court, though, on that. I can check that afterwards.

The Court: If there are any additional letters after you check them, you may add them. That will be satisfactory.

Mr. McCall: We might have some answers to certain letters there. I presume, too, your Honor, that those would be exhibits for only Radkovich, the prime contractor, and his sureties.

Mr. Benedict: It might be well, for the purpose of the record in order to keep this thing on an understood basis, that you introduce the letters that you want to put in as part of your case, and then I will introduce the ones that I want to put in, and we will do it that way. It might be better.

Mr. McPharlin: Yes. These will go in as my exhibits.

Mr. Benedict: All right, all right.

The Clerk: Do you want them marked?

Mr. McPharlin: Does Mr. McCall still wish me to go through the list here now and refer to the dates?

Mr. McCall: It was my suggestion that the date of each letter and the sender and the one addressed be stated. But [28] if that is——

The Court: Why don't you do this: Why don't you offer those as your exhibits, and then if there are any other letters that there is a desire to offer, you can offer them as your exhibits.

Mr. McCall: Yes, your honor.

The Court: And then all these and others can be considered together as comprising all the correspondence?

Mr. McCall: Yes, sir.

Mr. McPharlin: I offer into evidence a group of letters which are clipped together as our next exhibit in order.

The Clerk: That will be Radkovich and its sureties Exhibit F into evidence.

The Court: It will be received.

Mr. McPharlin: I offer next into evidence a document on the letterhead of "Wm. Radkovich Company, Inc." dated, with the heading "E. B. Woolley—Electric Contract", which consists of a brief resume made by Radkovich Company of his accounting between Woolley and himself as to this subcontract.

The Court: Exhibit G.

The Clerk: Radkovich and sureties' Exhibit G in evidence.

Mr. McPharlin: I will offer next into evidence a document consisting of a number of sheets of drawings which are captioned "Muroc Army Air Field, Muroc, Calif. Temporary Family [29] Quarters—Mechanical Plans and Details Sheet 6." That is the top page of the documents.

The Clerk: How many are there there? The number of sheets?

The Court: Are those the plans referred to in the contract?

Mr. McPharlin: Yes, your Honor. There are six sheets.

The Clerk: Admitted, your Honor?

Mr. McCall: May I ask if those sheets offered bear a date?

Mr. McPharlin: These sheets bear the date June 10, 1947.

The Clerk: Are these admitted, your Honor?

The Court: They will be received. Are these drawings that are referred to and are a part of the contract?

Mr. McPharlin: Yes, your Honor.

The Court: Together with the specifications?

Mr. McPharlin: Yes, your Honor.

The Clerk: This is Radkovich's and sureties' Exhibit No. H into evidence.

Mr. McPharlin: I offer next into evidence a blueprint consisting of one sheet, which is captioned "Revised Electrical Plan Muroc Army Air Field

Muroc Cal. Temporary Family Quarters." It is dated August 27, 1947.

The Clerk: Admitted, your Honor?

The Court: It will be received. [30]

The Clerk: Radkovich's and its sureties' Exhibit I into evidence.

The Court: Is there any order or any contract or any direction that accompanies this revised sheet? I was wondering if we could not put them together and offer them as one exhibit.

Mr. McPharlin: No, your Honor. Any other written document, do you mean, pertaining to this revised electrical plan?

The Court: Yes. In other words, I take it—is this the document concerning which there was a credit allowed? I am trying to identify this document.

Mr. McPharlin: This subsequent document?

The Court: This Exhibit I.

Mr. McPharlin: No. That is, we contend, the working drawings which were required under the contract. You see, the original contract contained the plans and specifications, and it also required working drawings to be submitted by the different crafts, for example, the electrical subcontractor.

The Court: What became of that drawing?

Mr. McPharlin: That is the blueprint that I have introduced. But the original from which the blueprint was made—

The Court: Is that part of the Exhibit H? Is Exhibit I a transcript from Exhibit H?

Mr. McPharlin: The Exhibit I is the electrical

plan, whereas the Exhibit H is also the electrical plan. Exhibit I [31] contains, I believe, details which are not in Exhibit H.

The Court: Exhibit I is not taken from Exhibit H, is that it?

Mr. McPharlin: Yes; it is taken from Exhibit H, with some additional detail added to it.

The Court: What is the date that this was delivered, this Exhibit I, to the subcontractor, I take it?

Mr. McPharlin: Just prior or on or about August the 27th.

The Court: After the main contract had been executed?

Mr. McPharlin: Yes, your Honor.

The Court: And after the original plans and specifications had been made.

Mr. Benedict: And after the subcontract had been entered into, too, also, your Honor.

The Court: Is that correct?

Mr. McPharlin: Yes; that is correct.

The Court: In other words, Exhibit I is a revised sheet of some electrical work.

Mr. McPharlin: Yes, your Honor.

The Court: Which was delivered to the subcontractor for execution, is that it?

Mr. McPharlin: I don't know now, your Honor, that it was delivered to the subcontractor. The subcontractor, I believe, had a part in the preparation of this. That is something [32] for the evidence.

The Court: If you expect to follow that up with

evidence, we will get a better understanding of it.

Mr. McPharlin: Yes.

Mr. McCall: Oh, yes; that will be followed with evidence.

The Court: Yes. All right.

Mr. McPharlin: Radkovich and its sureties will call as their first witness Wm. Radkovich.

The Court: This is all that you have now of these exhibits for the time being?

Mr. McPharlin: There may be others. I do not want to foreclose myself, but that is all at the time, your Honor.

The Court: At this time, all right.

Mr. McPharlin: Will you take the stand?

WM. RADKOVICH

called as a witness by the defendants and cross-claimants, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Wm. Radkovich.

The Court: Is it Radovich or Radkovich?

The Witness: Well, the "k" is silent. Some say "Radkovich" and some say "Radovich." [33]

Direct Examination

Q. (By Mr. McPharlin): What is your position with the Wm. Radkovich Company, Inc.?

A. President.

Q. And were you the prime contractor—I mean your company was the prime contractor on this Muroc job for the United States Government?

(Testimony of Wm. Radkovich.)

A. Yes, sir.

Q. Just tell the court very briefly what was this contract for; what was the construction that you were to do?

A. Construction for temporary housing at Muroc Army Air Base.

Q. What sort of temporary housing?

A. Low-weight, poured concrete houses.

Q. How many? A. 100.

Q. Did you negotiate or obtain a bid from Mr. Woolley, the subcontractor? A. I did.

Q. Your subcontract with Mr. Woolley is dated July 30, 1947. About when did he first submit his bid to you? A. I could not remember that.

Q. Well, about May or June, does that refresh your memory any? [34]

A. Probably around June.

Q. The first bid that he submitted to you was for how much? A. For \$75,000.

Q. What did you tell him, if anything, when you got that bid?

A. When I got the bid I told him that that job was his.

Q. Did he later come to see you about that bid?

A. Yes; he come back later and told me he had forgot the hot water heaters and that he had to have \$80,000 instead of \$75,000.

Q. Who was present at that conversation?

A. Well, I wouldn't know, except myself. I know him and I were together.

(Testimony of Wm. Radkovich.)

Q. Did he give you any quotation for water heaters at that time?

A. At that time he told me the hot water heaters were costing him \$61.00 wholesale.

Q. And how many hot water heaters were to be furnished under this original contract?

A. 100.

Q. And he told you that the hot water heaters would cost him \$61.00 each? A. That is right.

Q. Or a total of \$6,100? [35]

A. He had a figure from his wholesale house it would cost him \$61.00.

Mr. Benedict: Just a minute. If the court please, if this evidence is being introduced—there is one issue here, I think, probably should be brought to the court's attention, and I imagine this evidence is directed to it. The subcontract price was \$80,000. The Government decided after the job was started that they would furnish the water heaters, and they therefore deleted the water heaters from the job.

Now, there is one item of dispute there as to the amount that was to be deleted from the subcontract, and the Radkovich's claim is that there was a greater amount to be deleted than we concede is the case.

The Court: There was some amount under a thousand dollars there?

Mr. Benedict: Yes; that is right, your Honor. If the purpose of these conversations that preceded the making of the contract is to show that because the heaters were costing Woolley so much at that

(Testimony of Wm. Radkovich.)

time, and therefore the original contract price was increased that amount, and then after the contract was signed that it should be depleted or depleted by that same amount, I object on the grounds it is incompetent, irrelevant and immaterial. That is a matter for adjustment between the parties, and prices can fluctuate. And if it is introduced for any other purpose, it is certainly inadmissible [36] because all of these prior negotiations are merged in the written contract which is for \$80,000.

The Court: Isn't there some documentary evidence?

Mr. McPharlin: Yes; there is documentary evidence, your Honor.

The Court: Why don't you lay a foundation?

Q. (By Mr. McPharlin): Mr. Radkovich, on July 30th you entered into the subcontract with Woolley for \$80,000, is that correct?

A. That is right.

Q. And that subcontract called for the furnishing of 100 water heaters by the subcontractor?

A. That is right.

Q. Is that correct? A. That is correct.

Q. Now, I will hand you here Radkovich and its sureties exhibits, Exhibit No. B, and at the back of this document you will see a Change Order entitled "Modification No. 1" which states in part as follows:

"The Government, in lieu of the Contractor, will furnish one hundred electric water heaters, f.o.b. job site, for use under the contract.

(Testimony of Wm. Radkovich.)

“As a result of this change order the total contract commitment will be decreased in the amount of six thousand one hundred dollars.” [37]

Now, was that amount deducted from your original contract price, Mr. Radkovich?

A. Yes; it was.

Q. This modification No. 1 is dated August 18, 1947, which was 18 days after the execution of your subcontract?

A. That is right.

The Court: And that all appears in exhibit what?

Mr. McPharlin: Exhibit B.

Q. Mr. Radkovich, do you recall the exact amounts of the payments you made to Woolley, or will you need this document on your letterhead to refresh your memory?

A. I need the document.

Q. I will hand you Radkovich's Exhibit No. G which you may use, and ask you to tell the court the amount of the payments which you made to the subcontractor.

A. The amount of payments?

Q. That is direct payments that you made to the subcontractor.

A. \$48,914.27.

Q. Now, in addition to those direct payments which you testify you made to the subcontractor, did you make any payrolls on behalf of or at the request of the subcontractor to his employees?

A. Yes; on June 14th, \$536.

Q. How did you happen to make that subcontractor's payroll [38] of \$536?

A. He came up to the job the day——

(Testimony of Wm. Radkovich.)

Mr. Benedict: We concede that, your Honor. We concede that \$536, if that will shorten it.

Q. (By Mr. McPharlin): In addition to the direct payments and the payment of that payroll, do you have any back charges against this subcontractor? A. Yes; \$7,887.09.

Q. Isn't it true that in addition to those amounts Westinghouse Electric, since the commencement of this action, has also been paid \$16,562.54?

A. That is correct.

Q. Then on your accounting you show nothing further due to this subcontractor?

A. That is right.

The Court: Let me see. The contract was for a total of \$80,000?

The Witness: \$80,000.

The Court: A credit of \$6,100 and admitted charge back of \$2,213.53, is that correct?

Mr. Benedict: \$2,213.53.

The Court: Of which this \$536 was a part, is that correct?

Mr. Benedict: No. That \$536 would be in addition to that.

The Court: In addition? [39]

Mr. Benedict: Yes.

The Court: All right. I understand now the \$536. It is just to give me a glimpse of the figures that you are using here, seeing if I can make my calculation as I go along.

Mr. McPharlin: Yes, your Honor.

The Court: This contract was for \$80,000.

(Testimony of Wm. Radkovich.)

Mr. McPharlin: The original contract price, yes, your Honor.

The Court: And we deduct from that \$6,100?

Mr. McPharlin: \$6,100 even, your Honor.

The Court: \$6,100. That will be \$73,900. The payments were how much that you have made to Westinghouse?

The Witness: Payments was \$48,914.27 that we paid Woolley.

The Court: \$48,914.27 paid Woolley?

The Witness: Yes, sir.

The Court: All right. Then you paid how much to Westinghouse?

The Witness: \$16,562.54.

The Court: \$16,562.54 to Westinghouse?

The Witness: Yes, sir.

The Court: All right. That leaves \$8,423.39 according to my calculations.

The Witness: Yes, sir; less our back charges.

The Court: Your back charges you claim are how much? [40]

The Witness: \$7,887.09.

The Court: \$7,887.09.

The Witness: Plus payroll \$536.

The Court: Payroll \$536, is that right?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. McPharlin): Do you recall the approximate date that you commenced work on the job, Mr. Radkovich?

A. I do not. I don't remember the date.

No. 13606

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Rela-
tion of and to the Use of Westinghouse Electric
Supply Company, WM. RADKOVICH COM-
PANY, INC., et al.,

Appellees.

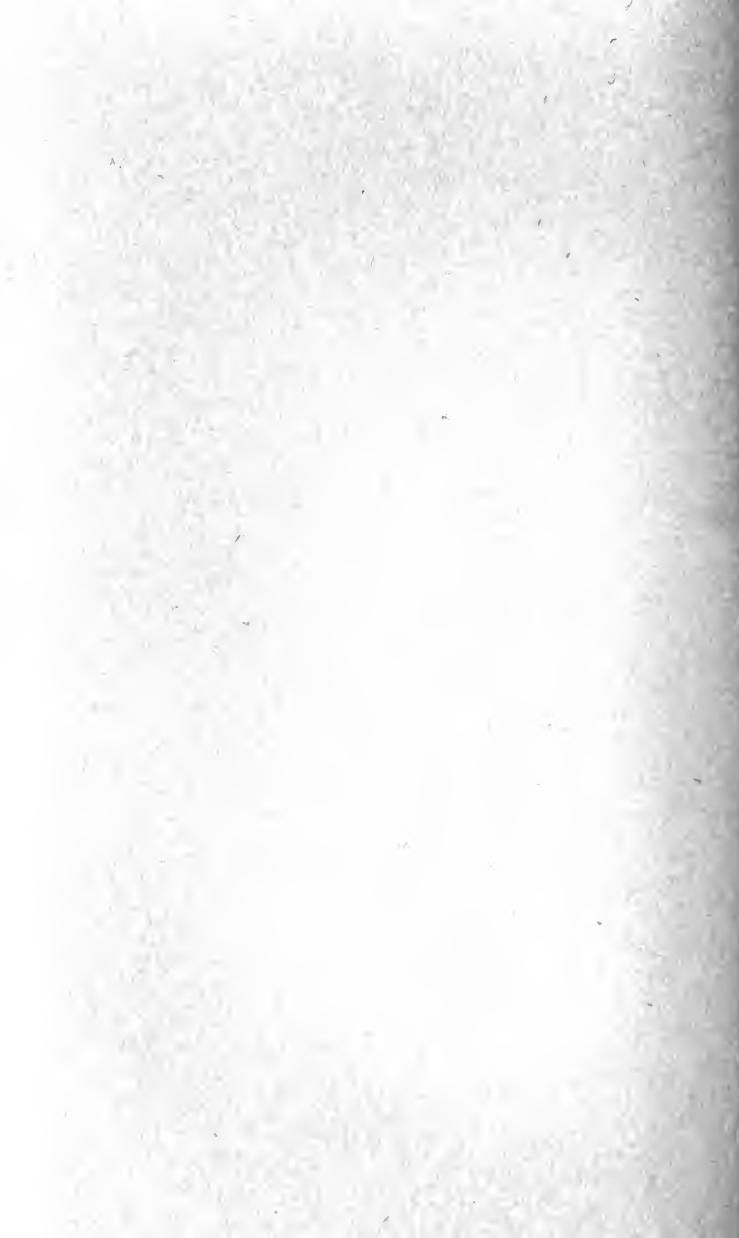
Transcript of Record

In Two Volumes

VOLUME II.

(Pages 261 to 535, inclusive)

Appeal from the United States District Court for the
Southern District of California, Central Division



No. 13606

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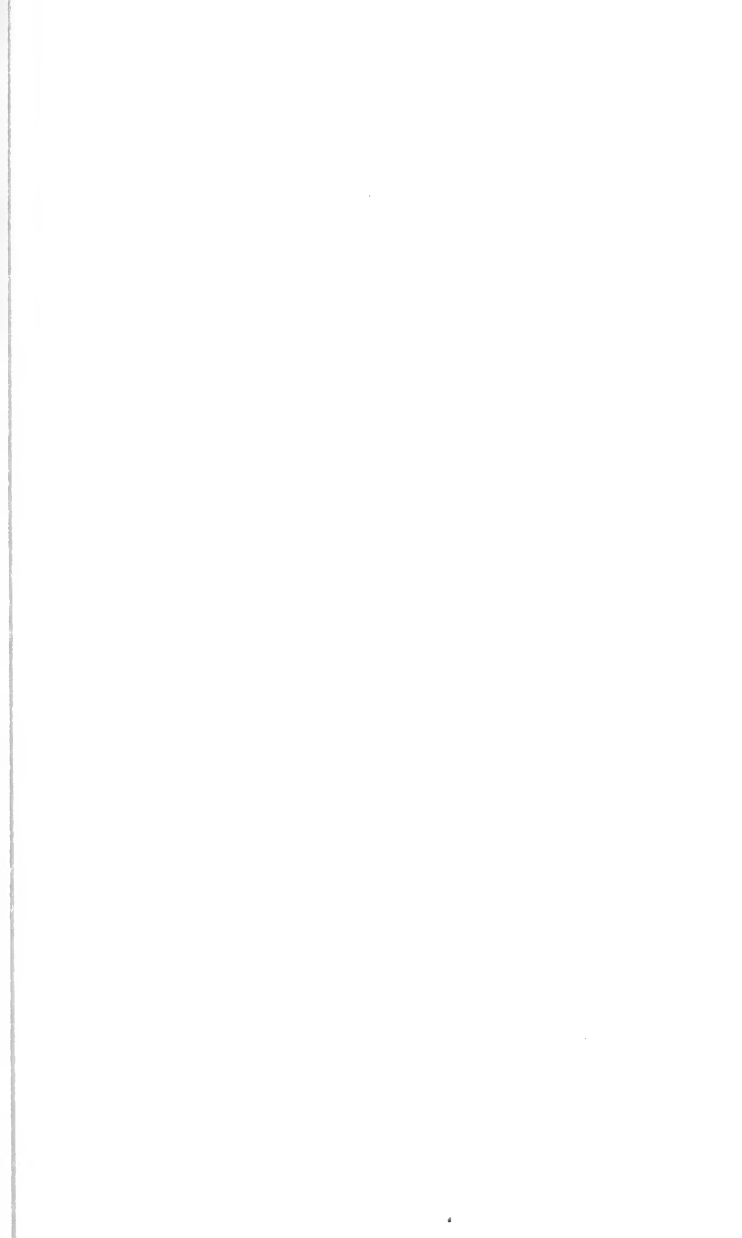
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(Pages 261 to 535, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division



(Testimony of Wm. Radkovich.)

Q. After you commenced work did Woolley go to work on his subcontract?

A. Yes. We set up a temporary shed up there for all subcontractors.

Q. Did you set up one for Woolley?

A. Yes, sir; a shed and tool place to keep his materials locked up.

Q. And he did go to work on his subcontract work, is that right?

A. He started prefabricating materials on the job.

Q. How were your payments made to Woolley?

A. Once a month, just the way we were getting paid from the Government.

Q. He was paid, then, on the basis of the work that he had accomplished up to that time?

A. Yes, sir. [41]

Q. On or about October, 1947 did Woolley come to you and request a payment of \$9,000?

A. He put in a payment—he sent in an estimate; it was around \$9,000; but the Government only allowed him \$5,000.

Q. Did Woolley come in to see you at that time about this payment? A. Yes; he did and——

Q. Did you have a conversation with him?

A. Yes, sir; I had it in my own office there.

Q. Who else was present?

A. No one but ourselves as far as I know.

Q. What was said by Mr. Woolley and yourself at the time of this conversation?

A. When I told him the Government would not

(Testimony of Wm. Radkovich.)

allow him except \$5,000, he told me they couldn't operate unless they had more money; he had to have \$9,000 that day. So I went out and borrowed \$4,000, on which he agreed to give me \$500 interest, then the next month or two or three months after, to put that \$4,000 against the contract.

Q. And on that day in October did you issue him two checks?

A. Yes; one for \$5,000 and one for \$4,000.

Q. What was the arrangement or conversation between you and Woolley, if any, as to the repayment to you of the \$4,000? [42]

A. Well, I told him I would take it out in the next estimate or the one after that, which would be the first month or the next month. The first month I let it go by. I wouldn't be sure on that, but I think either the first or second one he had a pretty good, substantial amount of money coming and I took that \$4,000 out of that payment.

Q. So on a subsequent payment he had coming you repaid yourself the \$4,000, is that correct?

A. That is right.

Q. Did Woolley continue throughout this job on the work or not?

A. Well, he was holding up our work all the time.

Q. Did he at any time ever leave the job?

A. Yes; he did.

Q. When was that, about?

A. I don't know the month. It must be in the files. We have letters in the files.

(Testimony of Wm. Radkovich.)

Q Was it after the first of the year, 1948?

A. It probably was.

Q. Did you have any conversation with him at the time he left the job?

A. Yes. I think we had a meeting with his attorneys up to Earl Shafer's, who was our attorneys at that time, just before that.

Q. Did Woolley state why he was leaving the job? [43]

A. I can't remember. The attorneys were in it. I wasn't much in the conversation, that part of it. He just walked——

Q. Was there a dispute at that time over the question of the fixtures? A. Yes, sir; it was.

Q. And did Woolley at that time refuse to install the fixtures or to furnish them?

A. He did.

Q. Did he leave the job? A. He did.

Q. For how long a period?

The Court: What fixtures are you talking about?

Mr. McPharlin: Electric fixtures.

The Court: All right.

Q. (By Mr. McPharlin): For how long a period was he off the job?

A. Approximately, I would say, a week or maybe shorter than that. I wouldn't know.

Q. And then he came back on?

A. Yes; after we hired another electrical contractor to come on the job which he started work, then he came back on the job again.

Q. I will show you Radkovich's Exhibit D, the

(Testimony of Wm. Radkovich.)

first back charge, pertaining to "2 light ceiling, porcelain". What [44] is that? "Ceiling lights" should that be?

A. Yes; "light ceiling,"—ceiling lights.

Q. Were those electrical fixtures?

A. Yes, sir.

Q. You notice here that there are a large number of these back charges which apparently are fixtures. Were all of these fixtures that you have included in your back charges paid for by yourself?

A. Yes; they were.

The Court: Is that Exhibit D?

Mr. McPharlin: Yes; that is Exhibit D.

Q. Was this after Mr. Woolley had refused to furnish these fixtures? A. Yes; it was.

Q. And you purchased the fixtures yourself?

A. That is right.

Q. You also show in your back charges payroll made for E. B. Woolley for the period from August 19th to September 8. Do you recall the occasion for your making the payrolls in August and September, 1948 for Woolley's men?

A. I do. He couldn't. He didn't have enough men on the job. He didn't have enough money. He didn't have no money to hire more men, so we had to hire them and put them on the payroll. I am sure that is what the occasion was. I mean I wouldn't swear to it. [45]

Q. You also have a back charge sheet in here—it is the last one of this group—where you show back charge to E. B. Woolley "15% overhead on

(Testimony of Wm. Radkovich.)

\$6,867.37 back charges." Will you tell the court what that back charge in the amount of \$1,030.11 consists of?

A. Well, that was for office and overhead.

Q. Do you mean that is—

The Court: How much was that?

Mr. McPharlin: That is \$1,030.11.

A. That was for the purchasing. We had to purchase the materials and have men on the payroll for it.

Q. Was that your overhead charge based upon these expenditures and payroll? A. Yes, sir.

Q. That you had to meet, which you claim was for Woolley? A. Yes, sir; it was.

Q. Mr. Radkovich, Mr. Woolley has claimed certain extras in this matter. Did you as the prime contractor receive any extras or additional compensation from the United States Government for any of the electrical work? A. No; I did not.

Mr. McPharlin: You may cross examine. [46]

Cross Examination

Q. (By Mr. Benedict): Mr. Radkovich, this general contract that you had involved the pouring of concrete houses where it was your function, as the general contractor, to erect the forms, is that not true? A. That is correct.

Q. And is it not true that Mr. Woolley, as the subcontractor, could not do any of the wiring work until the forms were up? Is that right?

(Testimony of Wm. Radkovich.)

A. Not in the house, but he could erect out in the field.

Q. He could cut wire and things of that sort?

A. Yes; all his wiring and everything in his shop.

Q. But as far as installing any of the wiring equipment in the forms, that could not be done until you had done your job?

A. That is right; but that only took an hour or two.

Q. Do you recall having given Woolley notice to proceed on this job?

A. Personally, myself, I would not know. The office probably did.

Q. I show you a letter dated August 8, 1947 on your letterhead and apparently signed by you, directed to Woolley and ask you if that is your signature?

A. That is not my signature. [47]

Q. It is not? A. No.

Q. Who signed it?

A. My man that worked for me, my office man.

Q. Who was that, Mr. Parks?

A. Mr. Parks.

Q. It was under your authority, however, was it not?

A. He was handling all the paper work.

Q. But he was authorized to send this out on your behalf, was he not?

A. That is right; that is right.

Mr. Benedict: I would like to introduce that into

(Testimony of Wm. Radkovich.)

evidence then, if the court please, as Woolley's first exhibit.

The Witness: May I correct that, please?

Mr. Benedict: Yes, surely. Pardon me.

The Clerk: That will be Woolley's Exhibit A into evidence, or, rather, Exhibit 1.

Q. (By Mr. Benedict): Do you know whether or not after that notice to proceed was sent to Woolley that he was given notice by either you or Parks to be ready on the job on September 1, 1947?

A. Mr. Parks handled all the arrangements on that.

Q. Do you know whether or not any such instructions were given him?

A. I wouldn't know. [48]

Q. You would not know. When did you have your first house ready to pour?

A. I don't know the dates.

Q. If I said it was about October 6, 1948, would that appear to you to be the correct date?

A. I wouldn't know.

Q. In event there was quite a delay between the time that you arrived on the job site yourself and the time you poured the first house, was there not?

A. There was with the army engineers, with ourselves and with the army engineers.

Q. During that period of time it is true, is it not, that Woolley was on the job with a crew of men?

A. With two men, I suppose—I don't know—erecting this—

(Testimony of Wm. Radkovich.)

The Court: That last exhibit may be received.

The Clerk: Yes, your Honor.

Q. (By Mr. Benedict): Do you recall having had a conversation with Woolley during the time that he was standing by with a crew of men before he was able to install any equipment in any of the forms, to the effect that unless he kept his crew up there, that he would be held liable for penalties by you? A. Absolutely not.

Q. Did you ever in any way state to him that he must [49] keep a crew of men standing by?

A. Myself, personally, no.

Q. Did anyone do it under your instructions?

A. Not that I know of.

Q. Now, Woolley completed his subcontract, did he not? A. Finally, yes.

The Court: Pardon me. What was the date that that first house was poured?

Mr. Benedict: I stated about October 6, 1948, your Honor.

The Court: Go ahead. Is that correct?

Mr. McPharlin: No. There has been no testimony on that point yet, your Honor.

Mr. Benedict: Well, it was simply in my question. We will have the Government engineer here in the morning and he will testify regarding it. I believe that I have stated it about right.

Q. When did you complete your contract, Mr. Radkovich? A. I don't remember the dates.

Q. Wasn't it sometime in October or November of 1948? A. That is somewhere near right.

(Testimony of Wm. Radkovich.)

Q. Do you know what your completion date was on your contract with the Government?

A. No; I do not.

Q. Wasn't it April 17, 1948?

A. It could have been. [50]

Mr. McPharlin: Mr. Benedict, I do not like to interrupt, but in the document entitled Radkovich's Exhibit B there is a change order by the Government pertaining to completion time.

Mr. Benedict: Is there? Well, I have not examined it.

Mr. McCall: Will you speak a little louder, Mr. Benedict? I can't hear over here very well.

Mr. Benedict: Well, it was just a matter to Mr. McPharlin, anyway.

The Court: There is a document, however, that shows the date of completion, is there not?

The Witness: Yes, sir.

Mr. Benedict: I believe that there is a document that shows the date of settlement under the contract. Wasn't that introduced by Mr. Behymer or did you introduce that?

The Court: You are talking about completion of the prime contract?

Mr. Benedict: Yes, your Honor. The Government engineer can testify as to that, anyway.

Q. Now, you state that Woolley was holding up the job. When did that first occur?

A. Mr. Parks would know exactly. I don't know. As far as all I know, we was getting calls in the office by the superintendents and calling Parks, and

(Testimony of Wm. Radkovich.)

he would tell me about it, and saying the job was being held up.

Q. So you do not know of your own knowledge, then, that [51] Woolley ever held up the job, do you?

A. Well, excepting—well, I don't think I would know.

Q. As a matter of fact the Government engineer notified you, did he not, that you were delaying the work?

A. On account of weather, yes.

The Court: We will take a ten-minute recess.

(Short recess.)

Q. (By Mr. Benedict): How many sets of forms did you have on the job site, Mr. Radkovich?

A. I believe there was either four or five.

Q. What was your plan schedule as to the number of houses that you were going to pour each day?

A. Well, we was planning two or three houses a day.

Q. Were you able to maintain that schedule?

A. No; for the simple reason, one reason, the weather was very much against us. We would work several days, many days we would work one or two hours and then we would have to send all the men home because either the cold wind or ice cold weather, zero weather, and we couldn't keep operating.

Q. There were some days when you poured no houses at all, isn't that true?

A. That is right.

(Testimony of Wm. Radkovich.)

Q. And on at least one occasion the roofs of two of the houses fell in, did they not, that you poured?

A. They were frozen, yes; that is right, because they [52] were frozen.

Q. Do you recall having had a conversation with Woolley about the time the job started or a short time afterwards, when he called your attention to the fact that he had been given a set of revised drawings which called for additional things not provided for in the original drawings that he had been furnished?

A. I don't recall that at all, sir.

Q. Don't you recall about that time his calling your attention to the fact that he had not been required under the original drawings to supply a bell system; that you told him that you would see that he was paid for that item as an extra?

A. That is right; that was right.

Q. So you did state to him that as to the bell system, that you would consider that as an extra?

A. That is right, because I started—the army engineer, himself, and I were on the job—I am quite sure it was on the job, and they would furnish the tubing, whatever it was for, or something, and the difference in the labor would not amount to much.

Q. Have you ever paid Woolley for that extra?

A. I couldn't tell you, sir.

Q. How about the telephone system; was anything said about that?

A. Well, I am confused on those two. I don't

(Testimony of Wm. Radkovich.)

know if [53] that is the telephone system that we was discussing or the bell system.

Q. Could it have been both of them?

A. It could have.

Q. How about the light in the closet; was anything said about that?

A. Well, there was a discussion about it, but the way I understand it, they deleted some other lights to put that light in the closet.

Q. Did you say anything to Woolley about your considering that an extra that you would see he was paid for?

A. Well, I wouldn't be too sure about that.

Q. You might have told him that?

A. I might have, because I remember at the time the superintendent of the job was telling me about it that they were deleting certain lights and putting this other light in there, and I thought it was evening it up as far as I know. Mr. Parks would know about that.

Q. Mr. Parks was employed by your company at that time, was he not? A. Yes, sir.

Q. What was his official designation?

A. Well, he was everything, practically, buying, organizing, and working under my instructions.

Q. Did your company authorize him to conduct all [54] negotiations with subcontractors?

A. Yes, sir.

Q. On behalf of your corporation?

A. Yes, sir; we did.

Q. You did not know anything about the va-

(Testimony of Wm. Radkovich.)

rious plans that were given Mr. Woolley in connection with his subcontract, did you?

A. No; I do not.

Q. Did Mr. Parks handle all of that?

A. Mr. Parks handled all of it.

Q. Mr. Barrington was also connected with you at that time, was he not?

A. Yes; he was the architect.

Q. Do you know who gave Woolley the plans that he was given, whether it was Barrington or Parks? A. I couldn't know, sir.

Mr. Benedict: That is all as far as Woolley is concerned, your Honor. I believe Mr. McCall wants to ask him some questions.

The Court: You may proceed to cross examine.

Mr. McCall: Mr. Clerk, could you tell me the exhibit number of the construction contract?

The Clerk: I had one subcontract which was C. I don't know whether that is the one you refer to.

Mr. McCall: Did counsel put in the original contract? [55]

Mr. McPharlin: That is Exhibit B, Mr. McCall.

Mr. McCall: Thank you. Is it the closing time, your Honor?

The Court: Oh, no. We will proceed until you gentlemen get tired. We will work until 4:30 or 5:00 if you wish.

Cross Examination

Q. (By Mr. McCall): Mr. Radkovich, I hand you Radkovich Ex. B and on "2a" it purports to

(Testimony of Wm. Radkovich.)

show "Schedule of Payment" Item No. 1.2.3.4." and ask you if that is the order in which the estimates were made up? A. That is right.

Q. And in your entire contract there were only four items which you had to estimate?

A. That is right.

Q. Will you state to the court which one of these four the electrical work came under?

A. Item 3.

Q. Now, what other work besides the electrical work came under Item 3?

A. All the plumbing, cooling system—no. The plumbing and the finish work, cabinet work.

Q. Go ahead. Is that all?

A. Well, the concrete house, the shells and the floors—no. The floors was in Item 2. That is the shell and the [56] electrical, plumbing, and the cabinets, finish cabinets.

Q. And that is all that came under Item 3?

A. Yes.

Q. And that is the plumbing—

A. And the painting.

Q. In other words, your part, the pouring of the house, that came under Item 3?

A. That is right.

Q. You poured the walls and then with a crane you set them into place, did you not?

A. That is right.

Q. And that was also true of the roof?

A. That is right; the roof was poured at the same time that the walls were poured.

(Testimony of Wm. Radkovich.)

Q. This house is called the "Le Tourneau" house?

A. That is right; the Le Tourneau method type house; yes.

Q. So Item 3 covered the house itself, the pouring of the house and setting it up, and the plumbing, the cabinets and the electrical?

A. And the painting.

Q. And the painting. A. That is right.

Q. Those five things?

A. That is right. [57]

Q. And that is all that Item 3 represents?

A. That is right.

Q. How did you arrive at the amount you would pay each subcontractor under Item 3?

A. Well, we would get together with the resident engineer on the job once a month and we would go over and see what percentage each contractor had done and add it into this Item 3.

Q. And before you sent out each estimate, then, you would accumulate the estimates from the subcontractors and take them up with the engineer?

A. That is right, except the first payment, except the first estimate.

Q. Do you have in your records the various percentages earned by the subcontractors under Item 3 in connection with all of the estimates?

A. No. All I was given was a slip of paper, just a piece of scratch pad paper from the resident engineer on the job, showing electrical was \$5,000 and they figured probably there was 10 houses poured and so much money for that; and that is the way

(Testimony of Wm. Radkovich.)

they brought in electrical, the same way plumbing, the same way painting, and the same way pouring the house.

Q. I hand you what purports to be photostatic copies of the various estimates approved for you, numbered from 1 to 11. I will ask you if you recognize these as the photostatic [58] copies of original estimates which you received from the Government?

A. Yes; that is the ones, I believe. I am sure they are.

Mr. McCall: I do not know if it would be better, your Honor, to offer these as one exhibit or 11 different exhibits.

The Court: Those are estimates of what?

Mr. McCall: Estimates of amounts paid to the general contractor, which include the amounts paid to this particular subcontractor.

The Court: How are they significant here?

Mr. McCall: They show the amount paid to the general contractor each month, which includes the amount earned by the subcontractor, and from these we have to learn how much was due the subcontractor. There is a dispute between the general contractor and the subcontractor as to what he was entitled to each month.

The Court: How would that result in this computation? In other words, you maintain that there was more allowed by the Government to the subcontractor than was paid, is that the situation?

Mr. McCall: We take the position, the surety, that in the beginning he made a premature payment

(Testimony of Wm. Radkovich.)

of \$4,000, as one thing not involved in here.

The Court: Yes. [59]

Mr. McCall: But from then on, he did not pay him as much as he had earned under his contract.

The Court: I see.

Mr. McCall: And further, that along about the fifth estimate they completely changed the method of payment from that provided for under the contract to some other form.

The Court: And these estimates would show the variance between the payments provided for in the contract, is that your theory?

Mr. McCall: Well, they tend to, your Honor. It appears that we have no document before us or evidence showing how much the subcontractor was entitled to, and by these estimates we hope, through this plaintiff and the Government engineer and the subcontractor, to show how much of this he was entitled to each month.

The Court: I see. All right. Insofar as this particular item is concerned, you might summarize each exhibit, if you wish.

Mr. McCall: And offer them as——

The Court: Offer them as one exhibit. They bear different dates, do they not?

Mr. McCall: Yes; they do, your Honor, different dates, mostly different months.

The Court: They can be received as one exhibit, except they can be marked 1-A, or whatever that number is, A, B, C, [60] etc.

Mr. McCall: This will be the first offered by the

(Testimony of Wm. Radkovich.)

defendant surety for the subcontractor.

The Court: How do you propose to mark these, Mr. Clerk?

The Clerk: Your Honor, did you wish me to start with a new series and number, or simply give them No. 2 and treat them in sequence as Woolley's exhibits? I think it would be better to start with "No. 2." Woolley has Exhibit No. 1 so far.

The Court: All right; this will be 2.

The Clerk: Do you want me to mark these as you go along?

Mr. McCall: These are offered by the surety.

The Clerk: Glens Falls?

Mr. McCall: Glens Falls.

The Clerk: Yes; that is right.

Mr. McCall: And is it more advisable to offer them as one exhibit or, since there are separate months to represent separate dates and separate payments, should they—

The Court: They may be offered as one exhibit, exhibit whatever exhibit it is, 2, and it will be 2-A, -B, and -C, etc., as we go along each month.

Q. (By Mr. McCall): The first partial payment, dated October, 1947, purports to show under Item 3 eight per cent of the work completed. I will ask you if that is correct, Mr. Radkovich? [61]

A. That is right.

The Clerk: Are you offering that?

Mr. McCall: Yes.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

(Testimony of Wm. Radkovich.)

The Clerk: That will be Glens Falls Indemnity Company Exhibit 2-A.

Q. (By Mr. McCall): The second partial payment, dated October, 1947, shows under Item 3 that 24 per cent of the work under Item 3 was completed; is that right, Mr. Radkovich?

A. As far as I know, it is.

Mr. McCall: I offer this next.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit 2-B in evidence.

The Court: It will be received.

Q. (By Mr. McCall): The third partial payment purports to show—it is dated December, 1947—that under Item 3 35 per cent of the work under Item 3 was completed; is that right, Mr. Radkovich?

A. Yes; it is right, but that is not 35 per cent of the electrical work. You are not referring to that, are you? That is 35 per cent of the total contract.

Q. That is 35 per cent of all the work?

A. Of all the work.

Q. The five items you mentioned a few moments ago? [62]

A. That is right; 35 per cent of the total job, not the one item, Item 3.

Q. That represents 35 per cent of the total work under Item 3?

A. That is right.

Mr. McCall: I offer this next, your Honor.

The Court: Of total work under Item 3, is that right?

The Witness: Yes, your Honor.

(Testimony of Wm. Radkovich.)

Mr. McCall: Yes, your Honor.

The Court: That is the same in each exhibit, A, B, and C, is that correct?

Mr. McCall: It is not the same percentage but it is the same question.

The Court: I mean the same item?

Mr. McCall: The same business, yes, your Honor.

The Clerk: This is Glens Falls Indemnity Company Exhibit 2-C into evidence.

The Court: Received.

Q. (By Mr. McCall): And the fourth partial payment, dated January, 1948, shows 47 per cent of the entire contract work under Item 3 to have been completed? A. That is right.

Q. Is that right, Mr. Radkovich?

A. That is right. They are all right.

Mr. McCall: I offer that next. [63]

The Court: It will be received.

The Clerk: Glens Falls Exhibit 2-D into evidence.

Q. (By Mr. McCall): And the fifth partial payment, dated March, 1948, shows 61 per cent of the entire contract work under Item 3 to have been completed, is that right? A. That is right.

The Court: What was the date of that?

Mr. McCall: March, 1948.

The Court: Was there one for February?

Mr. McCall: Apparently not, your Honor. I will offer this.

The Clerk: Glens Falls Exhibit 2-E into evidence.

(Testimony of Wm. Radkovich.)

The Court: Received.

Q. (By Mr. McCall): The sixth partial payment, dated March, 1948, shows 76 per cent of all the work under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

The Court: The date?

Mr. McCall: The date is March, 1948, your Honor.

The Court: Is that another March? I have one March.

Mr. McCall: I believe that is right. There were two in March, both of the fifth and sixth partial payments.

The Court: All right.

The Clerk: This exhibit for Glens Falls is Exhibit 2-F into evidence. [64]

Q. (By Mr. McCall): The seventh partial payment, dated April, 1948, shows 87 per cent of all the work under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

Mr. McCall: I offer this next.

The Court: Received.

The Clerk: Glens Falls Exhibit 2-G into evidence.

Q. (By Mr. McCall): The eighth partial payment shows that 90 per cent of all the work covered under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

The Court: Is there a date?

Mr. McCall: The date is May, 1948, your Honor.

The Clerk: Admitted, your Honor?

(Testimony of Wm. Radkovich.)

The Court: It may be received.

The Clerk: Glens Falls Exhibit 2-H into evidence.

Q. (By Mr. McCall): The ninth partial payment, dated June, 1948, shows 94 per cent of all the work under Item 3 to have been completed; is that right, Mr. Radkovich? A. That is right.

Mr. McCall: I offer this next.

The Court: Received.

The Clerk: Glens Falls' Exhibit 2-I into evidence.

Q. (By Mr. McCall): The tenth partial payment, dated July, 1948, shows 99 per cent of all the work under Item 3 [65] to have been completed; is that right, Mr. Radkovich? A. That is right.

Mr. McCall: We offer this next.

The Court: Received.

The Clerk: Glens Falls' Exhibit 2-J into evidence.

Q. (By Mr. McCall): The eleventh partial payment, dated September, 1948, shows 100 per cent of all work under Item 3 to have been completed; is that right, Mr. Radkovich?

A. That is July when? What date is that?

Q. September.

A. September. That is right.

Mr. McCall: I offer this, if it please the Court, as the next exhibit.

The Court: Received.

The Clerk: Glens Falls' Exhibit 2-K into evidence.

(Testimony of Wm. Radkovich.)

Mr. McCall: May I see No. 2, please?

The Clerk: You mean 2-A?

Mr. McCall: It is 2-A. Thank you.

Q. Mr. Radkovich, I hand you the Glens Falls' Exhibit 2-A, estimate dated October, 1947, marked the first partial payment, which shows eight per cent of all the work under Item 3 to have been completed, and ask you if that is the only record you have of the various subcontract work under Item 3?

A. As far as I know, that is correct.

Q. You do not have, any place, a breakdown showing how [66] much the various subcontractors were entitled to out of this eight per cent?

A. You mean for each subcontractor?

Q. Yes.

A. As far as I know, no; no, nothing. Like I said before, they just gave us a slip of paper and that was given to me by the resident engineer, and told me there was probably \$5,000 for electrical, 10,000 for plumbing, 5,000 for painting, and then maybe 50,000 for the house, whatever it is. They bunched it up together, whatever the percentage is, that comes to this amount.

Q. You mentioned five items in the construction of the houses which are under Item 3. Which one of those did you retain as prime contractor?

A. Myself?

Q. Yes. A. Do you mean what——

Q. What part of the work under Item 3 did you retain?

A. The house, the pouring of the house.

(Testimony of Wm. Radkovich.)

Q. The pouring of the house. Did you sub all the balance of it? A. That is right.

Q. In other words, you subbed the painting, the electrical— A. The plumbing. [67]

Q. —the plumbing?

A. And the cabinet work.

Q. And the cabinet work?

A. That is right.

Q. And you retained the pouring and erecting of the house? A. That is right.

Q. And all of those come under Item 3?

A. That is right.

Q. In connection with this first payment there how did you determine, if you did, how much Mr. Woolley was entitled to as the electrical subcontractor?

A. Well, I went on the project the first time myself. I got together with Mr. Ferguson. He was resident engineer at the time. We knew the site. We went over the site and gave the breakdown of each subcontractor which he thought how much money he was entitled to, and myself.

Q. And you sent that in?

A. That is right.

Q. Did you keep a copy of that so you could show the court? A. No.

Q. What percentage you handed in for the various work?

A. No; I did not. No; I did not. Like I said before, all the resident engineer ever gave me was a slip of paper [68] just for my own record to show

(Testimony of Wm. Radkovich.)

what percentage each subcontractor should be entitled to.

Q. When did he give you that, when he handed you your check?

A. No; when we made up the voucher.

Q. That is the payment voucher?

A. That is right.

Q. Not the estimate voucher you have before you?

A. Well, this is the same thing, isn't it? Payment and estimate voucher is the same thing.

Q. Did they not hand you a check?

A. No; they did not. They handed me this estimate voucher and it was signed either by myself or the superintendent on the job okaying the amount.

Q. Then how did you know the amount, the actual payment?

A. The Government sent a check into our office or we picked it up, either one. We would take the voucher in—no; that was not it, either. We borrowed money on this contract from the bank and the bank got the checks. We never did receive no checks. The bank advanced us on our estimates each month.

Q. Mr. Radkovich, can you look at the estimate before you and state to the court how much out of that Mr. Woolley, as the electrical contractor, was entitled to? [69]

A. Not by looking at this, because there is nothing here showing how much he was going to get, except my remembering that he put an estimate in

(Testimony of Wm. Radkovich.)

for \$9,000 or over \$9,000 for the first month, and all the Government allowed him was five.

Q. On what do you base your statement that all the Government allowed him was \$5,000?

A. That is just what I remembered in my mind. I had this slip of paper from the U. S. Engineer.

Q. And was that in pencil or was it typed?

A. Just pencil, just on a piece of scratch paper, because the Government——

Q. Was it signed by anyone?

A. No. The only thing was signed, this one here was signed by Ferguson, the voucher, and that had nothing to do with electrical or anyone else except Item 3 showed them all, and there was no breakdown in here at all showing what the electrical contractor got or the plumber or anyone else. After the first month the subcontractors were feeling that they were not getting what they were entitled to and they went over my head to the resident engineer on the job with their estimate. So he would know approximately what they had coming the next month, that month, during the work in that month; and that is the way he arrived at the percentage for the subcontractors and the percentage for myself. But it would still [70] be lumped back into Item 3, which, on the voucher or on the estimate, would never show nothing for any subcontractor.

Q. Under your system, then, of payments there was no way in the world for Mr. Woolley to calculate how much he was entitled to each month, was there?

(Testimony of Wm. Radkovich.)

A. After the first month, like I say, he took his estimate to the army engineer up there, and if the army engineer thought it was near right, he would tell me just about what. He would put on a slip of paper what he would think was Woolley or the plumber or anybody else would be entitled to that month. This contract, it is not broken down like any other contract; it is broken down regular into four items and the third item includes all the subcontractors and myself. It is very hard to find out or know what the subcontractor was really entitled to.

The Court: Did you keep a log book of your bad weather?

The Witness: The Government has it, your Honor. There were many days we couldn't work at all and many days we only worked an hour or two. Either the wind was blowing so bad and the cold weather was on so bad and icy weather, and we could not pour any frozen houses.

The Court: Go ahead.

Q. (By Mr. McCall): Mr. Radkovich, you say that the Government engineer—and that was Mr.—

A. Ferguson. [71]

Q. —Ferguson handed to you each month a slip of paper on which he showed the amount that each subcontractor was entitled to out of that particular estimate?

A. Out of particular Item 3, whatever it was.

Q. Yes. A. That is right.

Q. Item 3? A. That is right.

(Testimony of Wm. Radkovich.)

Q. You had that in connection with the other items on the contract?

A. You mean the plumber or what do you mean, on grading and footings? What do you mean? Is that what you are talking about?

Q. Everything not covered by 3.

A. No; because he gave us a breakdown on different items like items 1, 2 and 4. They were all separate items; so the first month he gave us 25 per cent on Item 1, which is grading.

Q. Then, I understand that under Item 3 there were five different parts of the work, one of which you retained and the other four you subbed out?

A. Yes; that is right.

Q. And each month Mr. Ferguson would give you a slip of paper? A. Plus the voucher.

Q. Together with the voucher?

A. That is right. [72]

Q. Is that the payment voucher?

A. Payment voucher?

Q. In other words, a check for the amount of money?

A. Not a check—a voucher, which is one of these here estimates, if that is what you want to call it. We just took this down to the army engineer's and that is what they would pay us on.

Q. And he would give you this slip of paper separately for each one of the four subcontractors?

A. That is right.

Q. Or would it be all of them on one slip of paper?

(Testimony of Wm. Radkovich.)

A. Well, all on one slip of paper. It just showed how he arrived at this Item 3 at 10 per cent or 8 per cent, to show how he arrived at that Item 3.

Q. And then that was the only record that you had showing how much out of each estimate was due the subcontractors? A. That is right.

Q. And did you show those to the subcontractors and particularly to Mr. Woolley?

A. No. We had them come in the office and they would send their own estimate each month, after the first estimate. The first estimate—that is not the first estimate they brought in the office—it could have been on. The estimates always come in the office, and they would take their breakdown to the engineer and he would work off of that to give them [73] their breakdown, to give them their estimate after the first month.

Q. But the first month, you say that the Government only allowed Mr. Woolley \$5,000, whereas he claimed more than \$9,000?

A. That is right; because we had a shed set up up there for his materials and, as I recall it, the shed was locked and the army engineer couldn't go in and examine the materials he had in the shop to give him any estimate on it. And he put out that month probably a lot more than \$5,000, for which he needed the money, he said.

Q. Then, do you mean by that, Mr. Radkovich, that Mr. Woolley had included in what he claimed material that was under lock and could not be viewed?

(Testimony of Wm. Radkovich.)

A. Well, that is what I believe that is what it was.

Q. You don't know that?

A. No; I don't. All I know is that the Government allowed them approximately \$5,000 or \$5,500, less the 10 per cent of whatever the amount was.

Q. Then when you say the Government allowed him that much, that is based on your recollection of the slip of paper? A. That is right.

Q. And that is all it is based on?

A. That is right.

Q. And that was handed to you by Mr. Ferguson? [74] A. That is right.

Q. And it was in pencil? A. Well, yes.

Q. And not typed? A. No.

Q. And what did you do with that?

A. I just had it for my own personal record and I threw it away.

Q. Did you throw it away? A. Yes.

Q. After you threw that away or destroyed that record, then you had no record whatever showing how much was due Mr. Woolley from the first estimate, did you?

A. Well, from the first estimate, no, except the statement they send in to our office, which practically corresponded all the time, within a thousand or two thousand dollars, with what Mr. Ferguson allowed them.

Q. You say "the statement they sent into our office." Who are "they"?

A. The Government. I mean these vouchers. I

(Testimony of Wm. Radkovich.)

am not talking about statement to Woolley and their statement they sent to us after the month's work was completed.

Q. Mr. Woolley's?

A. Mr. Woolley's or Mr. Gluck's, whoever it was.

Q. I believe you say that Mr. Woolley's statement contained [75] more than \$4,000 above what the Government allowed?

A. That is the statement he sent in, yes; \$4,000 above what the Government allowed, and that is when he told me that he couldn't operate unless he got \$4,000 more.

Q. That was the first estimate?

A. I am sure it was.

Q. Now, you say that you loaned him \$4,000 at the same time you paid \$5,000 from the first estimate?

A. Yes; in two checks, one for five and one for four.

Q. Did you take the promissory note for the \$4,000?

A. Well, I left that up to the office. I don't know what they done on it. That was advanced. I was going to take it out of the next payment when he had the next money due him, the next payment or the payment after that.

Q. In other words, you considered then at the time that you were only advancing him this \$4,000 for one month?

(Testimony of Wm. Radkovich.)

A. No; a loan, a loan for one month, a personal loan.

Q. But you do not know if your office took a promissory note from him or not?

A. I do not.

Q. Well, did you handle this transaction of \$4,000 personally?

A. No. I just told the office manager to give him a check for \$4,000 and I signed it, and what they done between themselves, why, I wouldn't know.

Q. Then did he give you \$500 for the loan of this \$4,000?

A. Yes. It was a few days, or I don't know how long afterwards, that he gave it to me.

Q. Well, did he pay you back \$4,000 or did you take it out of his estimate?

A. No; I took it out of the second or third estimate he had money due when he had some work completed.

Q. Did he tell you to take it out of that estimate?

A. He was very upset about it, because he thought I was going to take it out of the last estimate. He said that is the understanding he had, that I was going to take it out of the last estimate.

Q. And he objected to your taking it out?

A. No; he didn't object. He just said it would make it very hard for him.

Q. I hand you what purports to be a photostatic copy of a check for \$500 and ask you if that is the check that Mr. Woolley gave you for the loan of the \$4,000 in question? A. That is right; it was.

(Testimony of Wm. Radkovich.)

Q. And was that endorsed and cashed by you?

A. Yes, sir.

Mr. McCall: I offer this, if the court please, as the next exhibit for the defendant surety.

The Clerk: Admitted, your Honor? [77]

The Court: It may be admitted.

The Clerk: That will be Gens Falls Indemnity Company's Exhibit No. 3 into evidence.

The Court: I believe you said that was given as interest, was it?

The Witness: Yes, sir.

Q. (By Mr. McCall): Did you have any agreement with him at the time he paid you this \$500 as to how long it was paying for the loan of the \$4,000?

A. No; nothing whatsoever.

The Court: What is the date of that check?

The Clerk: November 25, 1947.

Q. (By Mr. McCall): And do you remember what date after that you took the \$4,000 out of his estimate?

A. No; I don't remember no dates. I presume it was in the second or third payment—the third estimate, the second or third estimate.

Q. I hand you what purports to be a list of the payments, showing your check number and the date of the payment, and ask you if you can look at that and tell the court which estimate you took the \$4,000 out of?

A. Well, I would say it would be either in December or in January. I presume it would be. I wouldn't know for sure.

(Testimony of Wm. Radkovich.)

Q. And the December payment shown on here is dated December 30, 1947, by check No. 1694 and the payment in the [78] sum of \$3,000?

A. That is right.

Q. How much was his estimate that month, if you can state? A. I could not.

Q. Do you have any records which would show that?

A. The office might have. I wouldn't know. I know it was one of those payments that we was very short ourselves, and I took it out because I had my own payroll to make.

Q. Now, there is nothing from which you can determine whether or not you took the \$4,000 out of the December 30, 1947 payment or the payment of January 28, 1948? A. Nothing.

Q. Then after the first payment, you say that Mr. Woolley, along with other contractors, took their estimates direct to the engineer, Mr. Ferguson? A. That is right.

Q. Then how did you learn how much they were turning in the estimate for?

A. Well, either myself or my superintendent on the job would be there with them when they would bring them up.

Q. In other words, you or your superintendent would go to Mr. Ferguson, the Government engineer. A. That is right.

Q. And turn in the estimate prepared by Mr. Woolley, [79] after the first estimate?

A. That is right.

(Testimony of Wm. Radkovich.)

Q. And did that continue all through the various estimates Mr. Woolley handed in later?

A. Well, as far as I know, yes, as far as I remember.

Q. And then did you or your superintendent approve the estimates handed in by Mr. Woolley as to amount?

A. The office did, whoever was in the office there when they sent a slip in, whoever brought the slip in or sent it in. I think one month Mr. Woolley flew up and picked up a slip of paper from Mr. Ferguson, himself, and brought it down, showing to what he was entitled that month.

Q. Could you look at the schedule of payments and tell the Court what month it was that Mr. Woolley flew up to the engineer?

A. No; I couldn't. I will say this much: I am sure there was months there when Mr. Woolley didn't even turn his estimates in until after the estimate was made up, if I recall right.

Q. What do you mean that Mr. Woolley would not turn in his estimate until after the estimate was made up?

A. Well, his own estimate to our office showing what he earned that month. There was one or two months, I am quite sure, as much as I can remember, that he didn't get his estimates in in time. [80]

Q. Then when he did not get his estimate in in time what effect did that have on his percentage of work or of his payments?

A. Well, he would take the breakdown to Mr.

(Testimony of Wm. Radkovich.)

Ferguson, but I mean we wouldn't get a letterhead from him showing his own statement. That was only one or two occasions, and maybe was just one that I remember something about. I just recall that.

Q. Did that prevent him from getting his money?

A. No. The Government went over the job and checked the percentages, and they just sent this voucher in on Item 3, and that is the way we arrived at the payment.

Q. And at no time in connection with any of the estimates were you able to state how much money was due Mr. Woolley out of any of the estimates?

A. No, excepting like I say, this one statement where he took the 4,000. I think he took the \$4,000, and then he had the \$7,800 or \$7,000, something like that, coming for that month, and instead of that we just gave him \$3,000 or \$4,000. It was one of the two months. I am quite sure it was.

Q. You deducted the money you say you loaned him that month?

A. That is right; because he earned that that month and I took it off that estimate then.

Q. I hand you what purports to be a letter on the [81] stationery of "Wm. Radkovich Company, Inc.," addressed to "E. B. Woolley September 18, 1947" and signed "E. H. Parks," and ask you if that is Mr. Parks' signature?

A. That is right.

(Testimony of Wm. Radkovich.)

Q. It purports to enclose Article 16, copy of Article 16 of your original contract pertaining to payment procedure?

A. What do you mean "payment procedure?"

Q. I will ask you if you recognize that letter as the one sent to Mr. Woolley telling him how he was to receive his payments?

A. I know nothing about this letter at all. This is Mr. Parks' handwriting. He wrote the letter. He was handling it.

Q. Who was Mr. Parks?

A. Mr. Parks is the man that worked for me, under myself.

Q. And he had authority to handle matters of this kind? A. That is right.

Mr. McCall: I would offer this, if the Court please, as this defendant's next exhibit.

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit No. 4 into evidence.

Q. (By Mr. McCall): I hand you, Mr. Radkovich, the [82] Radkovich Exhibit B, the contract you had with the Government, and refer you to page 4, Article 16, and ask you if that is the payment procedure referred to in that letter?

A. No; I wouldn't know. This was Mr. Parks who handled this item here.

Q. Do you know of your own knowledge what your contract with Mr. Woolley called for with reference to his payments?

(Testimony of Wm. Radkovich.)

A. Well, he is supposed to get paid five days after we get paid from the Government, as far as I knew. That is the understanding I had, less 10 per cent.

Q. And how was the amount to be paid to him calculated, if you know?

A. By the work he completed that month.

Q. Was that on a percentage basis of so much money? A. Percentage basis.

Q. And that is what is referred to in Article 16 of Radkovich Exhibit B?

A. I have never read that, so I would not know.

Q. You have never read Article 16 of your contract with the Government?

A. No; I haven't. No; I haven't.

The Court: Do you want to continue this evening or are we going to adjourn?

Mr. McCall: Well, your Honor, I have quite a few more questions, so I presume we had better adjourn. [83]

The Court: I think we might adjourn until tomorrow morning at 10:00 o'clock. I have another matter on at 9:30 which may take a few minutes over, but I think we will begin at 10:00. We will adjourn this trial until 10:00 tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day—Thursday, May 18, 1950.) [84]

Los Angeles, California, Thursday,

May 18, 1950, 10:00 a.m.

(Case called by the clerk.)

The Court: You were on the stand, were you not, Mr. Radkovich?

Mr. Radkovich: Yes.

Mr. Benedict: If the Court please, we have Mr. Ferguson, the resident engineer, here, and he is anxious to get back to his work if we may put him on out of order.

The Court: Yes; you may.

Mr. Benedict: Thank you. Mr. Ferguson, will you take the stand, please? He is being called as a witness on behalf of Woolley.

RALPH E. FERGASON

called as a witness on behalf of defendant, cross-defendant, and cross-claimant Woolley, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Ralph E. Ferguson, F-e-r-g-a-s-o-n.

Direct Examination

Q. (By Mr. Benedict): Mr. Ferguson, what is your business or occupation?

The Court: Pardon me just a moment. I would appreciate it if you can direct your questions from over in this direction somewhere, where we can see the witness and hear him [87] better.

Mr. Benedict: Yes; I will be glad to do that.

(Testimony of Ralph E. Ferguson.)

Q. What is your business or occupation, Mr. Ferguson?

A. I am resident engineer for the army engineers.

Q. How long have you occupied that post?

A. Approximately 18 years.

Q. Calling your attention Job No. Muroc AAF7-210-2, at Muroc Army Air Field, were you connected in any way with that particular job?

A. Yes, sir. I was resident engineer on that job.

Q. Were you the resident engineer from the commencement of the work to the completion of the work? A. Yes, sir.

Q. Will you state whether or not you were on the job daily during the progress of the work?

A. I was on the job daily. I think there was a week that I was gone on the entire job.

Q. When did the work commence on this job?

A. On the 28th of July, I believe, in 1947.

Q. And when was the first house poured on the job site?

A. The first house was poured on October the 2nd, '47.

Q. Do you know the defendant and cross-claimant E. B. Woolley? A. Yes, sir.

Q. Did you see him on the job site prior to October 2, [88] 1947? A. Yes; I did.

Q. Do you know whether or not he had a crew of men on the job site prior to that date?

A. He did.

Q. When was the job finished, Mr. Ferguson?

(Testimony of Ralph E. Ferguson.)

A. Well, I can't tell you that. This job was taken away from the contractor and finished by the Government.

Q. When was it taken away from the contractor; do you know that?

A. December in 1948, I believe.

Q. And what was the reason for the Government taking the job away from the contractor?

A. It was not being finished satisfactorily.

Q. Do your records show the date the job was required to be completed under the contract with Radkovich?

A. Yes, sir.

Q. Can you give us that date, please?

A. The 19th of April—wait a minute, now. He had 270 days from the 19th of April, 1947, to finish the job.

Q. Were any extensions of time granted Radkovich by the Government?

A. I don't think so.

Q. Mr. Ferguson, did Mr. Woolley delay the progress of this job in any way? [89]

A. I don't think so.

Q. In reference to the weather that occurred during the progress of the work on this job, did the weather delay the work in any way?

A. Well, it did some.

Q. To what extent would you say that it delayed the work?

A. Well, we had high winds occasionally and it was cold, down probably to 6 above zero a few times, and we had some rain; and I would say in

(Testimony of Ralph E. Ferguson.)

the entire job—this is just a guess now—it did not delay them over 10 days, at most, on the entire job.

Q. That delay of 10 days that you have given, is that your best estimate of the total number of days that the job was delayed?

A. Well, I would say it is not over 10 days.

The Court: When you say “270 days” do you mean working days?

The Witness: Calendar days, sir.

The Court: Calendar days.

Q. (By Mr. Benedict): What was the reason for the completion of the job extending past the 270 days that you have mentioned?

A. Well, I would say that the contractor did not proceed in the right manner to get it done in that time. [90]

Q. Would it be your opinion that he could have completed the work within the 270 days had he proceeded properly?

A. I think, if it had been executed properly, it could have; yes.

Mr. Benedict: That is all.

The Court: Just a moment.

Mr. McPharlin: No, no.

The Court: No questions?

Mr. McPharlin: No questions.

Mr. McCall: Yes; I would like to ask some questions.

The Court: All right.

Mr. McPharlin: Is that the order, your Honor?

(Testimony of Ralph E. Fergason.)

I assume that Mr. McCall should next examine the witness on direct.

The Court: He has called him out of order. I think that would be better.

Direct Examination

Q. (By Mr. McCall): Mr. Fergason, do you remember Mr. Woolley bringing his estimates, from time to time, as the job progressed to get your approval? A. Yes.

Q. Now, do you remember whether or not he brought his first estimate?

A. No, sir; he did not.

Q. But from the first estimate on, he brought them to [91] you to get your approval as to amount?

A. I would not say from there on, but he did bring a lot of them to me. I don't remember which ones, necessarily.

Mr. McCall: I have asked counsel if he can produce the originals delivered to Mr. Radkovich or Radkovich Corporation, dated February the 12th and March the 10th, 1948. Is it possible to get the originals?

Mr. McPharlin: I believe I could locate them, Mr. McCall. There are voluminous files which I do not have here. I have only segregated those which Mr. Benedict and I had previously gone over. However, if counsel states those are the true copies, why, I am willing to accept them as such.

Mr. McCall: There is some writing on this and

(Testimony of Ralph E. Ferguson.)

it is in pencil, and I suggest you strike through that.

Mr. McPharlin: Yes.

Mr. McCall: And use it otherwise.

Mr. McPharlin: May we, your Honor, scratch through these pencil notations as having no bearing?

The Court: You may.

Q. (By Mr. McCall): Now I hand you what purports to be the estimate dated February 12, 1948, and ask you if you can state to the Court how much you allowed Mr. Woolley on that estimate you have in your hand?

A. On the material I allowed the full amount.

Q. And what was the full amount? [92]

A. The amount of the material was \$18,000. Your full amount is twenty-two here. I allowed the full amount on the material, but I don't know about the rest of it.

The Court: What was the amount, eighteen or twenty-two?

The Witness: Eighteen thousand on the material. The full amount is twenty-two.

The Court: Yes.

Q. (By Mr. McCall): Will you state the exact amount, full amount? A. The total?

Q. Yes.

A. The total amount is \$22,798.50.

Q. And you do not remember whether you allowed that amount or only the \$18,798.50?

A. That is right.

(Testimony of Ralph E. Fergason.)

Q. Then I hand you the estimate from E. B. Woolley dated March 10, 1948, and ask you if you recognize that as the one he gave you or a copy of it?

A. Yes; I remember this. This was \$21,999.58 for heaters and I allowed the full amount on those, and he has asked for \$24,999.58. I don't know whether I allowed that full amount or not, but I did allow the \$21,999.58. I remember that specifically.

The Court: March, 1948, is that it?

Mr. McCall: On March the 10th, 1948, your Honor. [93]

Q. I believe you state you do not remember whether or not you allowed the full \$24,798.58?

A. That is right.

Q. Do you know if Mr. Woolley made an airplane trip to see you regarding one of these estimates, Mr. Fergason?

A. That is right; he did. He did; yes.

Q. And could you state to the Court which of these estimates he made?

A. The one on the \$21,000 worth of electric heaters.

Q. Is that the one, \$21,999.58?

A. Let me see it. I think that is right. That is right; \$21,999.58 on the electric wall heaters, Thermador heaters.

Q. Where did he contact you at that time?

A. In my office.

Q. Where was your office?

(Testimony of Ralph E. Ferguson.)

A. Muroc, at the air base.

Q. And just the two of you present?

A. Oh, I don't remember.

Mr. McCall: That is all, thank you.

The Court: Any cross examination?

Mr. McPharlin: Yes, sir.

Cross Examination

Q. (By Mr. McPharlin): Mr. Ferguson, you have stated that work commenced [94] July 28, 1947, and the first house was poured October 2, 1947, is that correct?

A. The first house was poured on October 2, 1947. Let me check a little more about the starting date. When did I tell you, the 28th of July?

Q. Yes.

A. They actually started unloading equipment on July the 31st, but his notice to proceed on the job was dated the 22nd of July, 1947, and it was received on the 24th of July, 1947, and that is the time the contract counts from.

Q. Do you know when Woolley first came on the job? A. No, sir.

Q. Isn't it true that these 100 houses were all uniform, built to the same plan and design?

A. That is right, sir.

Q. Now, isn't it also true that the electrical wiring was placed in pipes in some type in these concrete houses? A. Conduit; yes, sir.

Q. Isn't it also true that that, in the usual course of construction, required prefabrication?

(Testimony of Ralph E. Ferguson.)

A. Well, yes; to some extent.

Q. All I am getting at, Mr. Ferguson, is that there is or there was on this particular job considerable preliminary work to be done before the first actual pouring of a house?

A. That is right.

Q. And that would apply to the electrical contractor himself, is that not true?

A. That is right.

Q. In other words, had the electrical contractor not showed up on that job until October 2, 1948, at the time that first house was poured, that would have caused considerable difficulty, would it not?

A. That is right.

Q. You have stated, Mr. Ferguson, that the Government eventually took over these jobs at the latter part of 1949. Wasn't that because the contractor was financially unable to continue with the work?

A. It was in the latter part of 1948, wasn't it?

Mr. Benedict: Just a minute, if the Court please. I object to that as incompetent, irrelevant and immaterial as far as cross-claims between these parties are concerned.

Mr. McPharlin: Well, that has been brought out on the direct examination. I have the right to inquire into that as to whether or not the contractor was in default in the actual construction work or what the facts were, your Honor.

The Court: There was a voluntary statement made by the witness that the Government took it over. You should be allowed to inquire into the reasons.

(Testimony of Ralph E. Ferguson.)

Q. (By Mr. McPharlin): Wasn't the contractor in financial difficulties or wasn't he broke at the time the Government [96] took it over, Mr. Ferguson? A. I believe that is right.

Q. And the surety companies had already been called into the picture, hadn't they?

A. That is right, sir.

The Court: I did not get the last.

Mr. McPharlin: And the surety companies had already been called into the picture.

Q. At that time when the Government took it over wasn't the chief trouble due to the concrete roofs on these houses leaking or not being satisfactory?

A. That is right, sir.

Q. And these were, as I understand—and I would like your opinion—weren't these experimental houses, this concrete type of construction they were using?

A. That is right; they were.

Q. And these concrete roofs which were installed by the contractor did not prove satisfactory?

A. That is right.

Q. And when the Government stepped into the picture, why, changes had to be made to correct those concrete roofs, I believe?

A. That is right, sir.

Q. You have stated that there was no extension of time to your knowledge. [97]

A. Well, there is. I would like to chage that. I have it right here.

(Testimony of Ralph E. Ferguson.)

Q. I have a copy here in our exhibit, too, which is an executed contract.

A. Modification No. 2 extends to June, 1948. Is that what you have?

Q. Yes; that is the same that I have, Mr. Ferguson. It is that modification order. In addition to the actual prevention of work by weather, isn't it also true that some of these concrete roofs were frozen by the below-freezing weather? I don't know if you use the term "frozen," but isn't it true that the zero weather in some cases ruined the concrete that had been poured?

A. No; I don't believe so.

Q. Weren't there, I believe, two occasions on which the concrete roofs collapsed?

A. No. The concrete roofs settled, and we rejected the house because the roof settled; and it might have been due to cold weather, but it did not freeze, because the contractors had heaters in there to keep them hot.

Q. On the pouring of concrete, that is directly affected by the weather, isn't it? I mean at a certain point concrete does not properly set up?

A. That is right.

Q. In reference to Woolley's estimates was it your duty, [98] as the resident engineer, to determine the amount of progress payments due from the prime contractor to any one of his subcontractors?

A. No, sir.

Q. And you did, I believe, on a number of occasions furnish Mr. Radkovich with notations or in-

(Testimony of Ralph E. Ferguson.)

formal notes as to what you felt a certain subcontractor—how much of his work had been completed, didn't you? A. That is right, sir.

Q. But did you keep any copies? A. No, sir.

Q. Of those informal notes? A. No, sir.

Q. In referenc to those two payment estimates that you have referred to do you know whether or not Mr. Radkovich had any back charges against Woolley at those times, or did you inquire into that? A. How do you mean?

Q. I mean you have made reference to two estimates, one of February and one of March. Did you inquire as to or do you know whether at the time those payments may have been due to Woolley that Radkovich had any back charges against Woolley, or did you go into that?

A. No; I didn't. I don't believe I did.

Q. There has been reference to an estimate of March. [99] At that time did you inquire as to whether or not Woolley had any unpaid bills on his subcontract, or did you go into that?

A. I don't think so; no.

Q. And you did not inquire into the filing of a claim against the prime contractor by Westinghouse, did you? A. No, sir.

Q. Then as I understand it, you did on those two occasions, to your recollection, give an estimate as to how much work had been completed, but you did not attempt to make any decision as to how much money, if any, was actually due Woolley?

A. Now, what is that?

(Testimony of Ralph E. Ferguson.)

Q. But you did not make any decision as to how much money, if any, was actually due Woolley under his subcontract?

A. Well, I couldn't, because that would be up to the contractor.

Q. You were familiar with or generally familiar with the prime contract plans and specifications, weren't you, Mr. Ferguson? A. That is right.

Mr. McPharlin: I would like to read into the record some of the provisions here with which we are concerned.

Mr. McCall: As I understand it, counsel already has introduced into evidence what he proposes now to read, and I object to the reading of only a part of it, as the document [100] itself is the best evidence and it contains all of the record.

Mr. McPharlin: I think, of course, I do not want to read all of our documents. I would like to make reference to provisions that I feel are directly pertinent and, of course, counsel for the other side may make reference to those provisions they wish to bring out and bring to the attention of the Court.

The Court: Do you expect to inquire of the witness with reference to these provisions?

Mr. McPharlin: Yes; I do, your Honor.

The Court: You may proceed.

Mr. McPharlin: In the subcontract, on the first page, it has this paragraph: (Radkovich and Surety Exhibit C)

“Whereas, the subcontractor has read and fully

(Testimony of Ralph E. Ferguson.)

is familiar with the terms, provisions and conditions of said principal contract, and understands the respective rights, powers, benefits, duties and liabilities of the contractor and of all subcontractors and of the United States of America thereunder;”——

The Court: Of course, the witness would have no information on the provision of that kind.

Mr. McPharlin: Yes. Well, I will bring this to the witness's attention. On page 3, paragraph 6, it states:

“It specifically is understood and agreed that the interpretation and construction of all of [101] the terms, provisions, and conditions contained in this sub-contract shall be subject to the interpretation and construction of the principal contract and all such interpretations and constructions of the principal contract shall be fully binding upon each of the parties hereto.”

Q. Now, in the principal contract, Mr. Ferguson, with which you are familiar, in Article 2 of the general provisions it has:

“Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In any case of discrepancy in the figures, drawings or specifications,

(Testimony of Ralph E. Ferguson.)

the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided."

Now, it is true that detailed drawings were requested of the contractor, or working drawings, isn't that correct, Mr. Ferguson?

A. Were requested of the contractor?

Q. Yes.

A. Blueprints, yes; shop drawings, yes. The main drawings on the job were furnished by the Government, I believe.

The Court: Pardon me. Are you talking about the drawings that accompanied the specifications and the contract, or some other drawings subsequently made?

Mr. McPharlin: No; we are speaking of the main drawings that he has just referred to. I will show them.

The Court: The main drawings are the ones that were part of the contract, is that it?

Mr. McPharlin: Yes, sir, your Honor.

The Witness: They were part of the contract and furnished by the Government.

Q. (By Mr. McPharlin): Are these the drawings that you are referring to, Mr. Ferguson, could you tell us?

A. Yes; these are the contract drawings.

Q. The exhibit you have just referred to is

(Testimony of Ralph E. Ferguson.)

marked Radkovich's No. H. I will also hand you Radkovich's Exhibit No. B, the contract document itself containing the specifications. Now calling your attention to the specifications, Mr. Ferguson, I would like to direct your attention to what I have on my copy as page 15-1. A. All right.

Q. This is marked at the head "Section 15 Electrical Work; Interior." Is this the section that pertains to the electrical work? A. Yes, sir.

Q. Now, I would like to read to you the first paragraph of this Section 15. The first paragraph is marked 15-01. "Scope."

"The work covered by this section of the specifications consists of furnishing all labor, equipment, supplies, and materials, (except equipment designated to be furnished by the Government) including pilot lamps and performing all operations, including cutting, channeling, and chasing, necessary for the installation of complete interior wiring systems, duct systems, and electric service connections in strict accordance with this section of the specifications and the applicable drawings and subject to the terms and conditions of the contract."

On page 15-2, paragraph 15-03, subparagraph b, it states;

"Materials and Equipment Schedules. As soon as practicable and within thirty days after the date of award of contract and before any materials, fixtures, or equipment are purchased, the Contractor [104] shall submit to the Contracting Officer for approval a complete list, in triplicate, of materials fixtures, and equipment to be incorporated in

(Testimony of Ralph E. Fergason.)

the work. The list shall include catalog numbers, cuts, diagrams, drawings, and such other descriptive data as may be required by the Contracting Officer. No consideration will be given to particular lists submitted from time to time. Approval of materials will be based on manufacturers published ratings. Any materials, fixtures and equipment listed which are not in accordance with the specification requirements may be rejected."

And it states under subparagraph "c. Options of the Government.

"If the Contractor fails to submit for approval within the specified time, a list of materials, fixtures, and equipment in accordance with the preceding paragraph, the Contracting Officer will select a complete line of materials, fixtures, and equipment. The selection made by the Contracting Officer shall be final and binding and the items shall be furnished by the Contractor without change in contract price or time of completion." Now, paragraph 15-19 of this section. "Fixtures.

"Where type numbers are indicated on the drawings, the Contractor shall furnish and install all lighting fixtures in accordance with the applicable details." [105]

You are familiar with these specifications I have read, aren't you, Mr. Fergason? A. Yes, sir.

Q. And you are also familiar with the drawings? A. Yes, sir.

Q. You have been a resident engineer for the Government for 18 years, is that correct?

A. That is right, sir.

(Testimony of Ralph E. Ferguson.)

Q. And you are an engineer yourself?

A. That is right, sir.

Q. Now, Mr. Ferguson, in your opinion are the fixtures, lighting fixtures, required of the prime contractor to be furnished in these houses under this contract and plans?

Mr. Benedict: Just a minute, if the Court please. Are you through?

Mr. McPharlin: Yes.

Mr. Benedict: I wish to object to the question on the ground it calls for the conclusion of the witness and endeavors to usurp the very thing that the Court is called to pass upon, first. And secondly, upon the ground that the dispute between the subcontractor and the general contractor is based upon the action of the contractor in having given the subcontractor a set of plans and telling him that those were the plans, and based upon his reliance upon those, he entered into this contract. [106]

The Court: Not having read any of these papers, what do you propose to show by this witness by your question?

Mr. McPharlin: This witness is an expert and he was the resident engineer. He is well qualified. This dispute, your Honor, is a dispute between the subcontractor and the prime contractor. The prime contractor entered into a subcontract with Woolley, which, quoting from the subcontract, states as follows:

“The contractor engages and the sub-contractor agrees that, under the general supervision of the

(Testimony of Ralph E. Ferguson.)

contractor, the sub-contractor, upon receipt from the contractor of written notice to proceed, will furnish all labor and materials, tools, machinery, equipment, facilities, supplies and services, and do all of the things more specifically set forth and described in Schedule 'A' hereto attached, all in accordance in all respects with those certain specifications attached hereto and designated Schedule 'B', such specifications by this reference thereto being incorporated herein and made a part hereof; any of such matters or things by the specifications specifically provided to be furnished by the contractor or by the United States of America need not be furnished by the sub-contractor hereunder. The sub-contractor agrees that he will commence work under this contract within 2 days from and after the [107] receipt by him of such written notice to proceed from the contractor, and further promises and agrees to prosecute all of his work hereunder diligently and to co-ordinate his work with the work of other persons so that the sub-contract work may be completed on or before the 15th day of April, 1948. It mutually is acknowledged that time is of the essence of this sub-contract. By virtue hereof the sub-contractor binds himself to the contractor and to the United States of America to comply fully with all of the undertakings and obligations of the contractor under the principal contract, excepting only such matters as shall not apply to the sub-contractor's work hereunder as set forth in said principal contract.

(Testimony of Ralph E. Ferguson.)

“The sub-contractor further promises and agrees to perform all of his work hereunder pursuant to, and to supply all of the materials provided for herein, to, and otherwise to be fully bound by and perform each and every of the terms, provisions and conditions as contained in the principal contract and as shall be applicable to the services to be performed and the materials to be supplied by the sub-contractor hereunder. In the event that for any reason any doubt should arise as to the applicability of any of the terms, provisions or conditions of the principal contract [108] with respect to said services or materials to be rendered and supplied by the sub-contractor hereunder, then the conclusion of the contractor with respect to said applicability or inapplicability shall be conclusive and final.

“The consideration for the work to be done hereunder inclusive of the services to be rendered and materials to be furnished shall be the sum of \$80,000.00. All of such work to be done, services to be rendered and materials to be furnished shall be in strict accordance with the specification, schedules and drawings applicable, all of which same hereby are made a part hereof, and none of the same may be altered, changed or modified in any manner or respect without the written consent of the contractor being first had and obtained. The aforementioned consideration shall be paid to the sub-contractor upon invoices and vouchers surrendered therefor, in such manner and form as shall be pre-

(Testimony of Ralph E. Ferguson.)

scribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion, affecting the generalities of the references to the principal contract and the agreements of the sub-contractor hereunder to be bound thereby, payments shall be made by the contractor to the sub-contractor only in accordance [109] with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the sub-contractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of said Article 16." It goes on to paragraph 6.

"It specifically is understood and agreed that the interpretation and construction of all of the terms, provisions, and conditions contained in this sub-contract shall be subject to the interpretation and construction of the principal contract and all such interpretations and constructions of the principal contract shall be fully binding upon each of the parties hereto."

It has already been stipulated, your Honor, that this is the prime contract; that these are the plans and specifications which Mr. Ferguson has that the sub-contract was entered into on and which are a part of the sub-contract. And now the dispute is between the contractor and the sub-contractor as

(Testimony of Ralph E. Ferguson.)

to the interpretation of those plans and specifications. We have a question to a witness here who is the best qualified man, I assume, in the Court, and I would like to have his opinion, your Honor.

The Court: As to the interpretation?

Mr. McPharlin: Of the plans and specifications which are in dispute.

The Court: In what respect do you want an interpretation?

Mr. McPharlin: In this respect: You will notice that in Mr. Woolley's complaint or cross-claim he has alleged that the furnishing of electrical fixtures on this work was not an obligation of his under the sub-contract; so that is one of the issues in this case, whether under the plans and specifications for this electrical work the subcontractor, Mr. Woolley, is obligated to furnish the electrical fixtures.

The Court: Do your plans show electrical fixtures as part of the plans?

Mr. McPharlin: Yes. That is what I was going to go into with Mr. Ferguson here. I was going to ask him to explain, your Honor—

The Court: And do your specifications refer to electrical fixtures?

Mr. McPharlin: Yes. I have just finished reading those specifications where the reference to "fixtures" is made in numerous places.

The Court: Is it apparent on the face of the plans and within the descriptive matter in the speci-

(Testimony of Ralph E. Ferguson.)

fications that there is no ambiguity, or is there an ambiguity?

Mr. McPharlin: There is this one ambiguity, I believe, [111] on which Woolley is relying, as I understand it. In one place in the specifications it refers to code numbers for fixtures. Of course, what code numbers are, etc., is probably a matter for experts, and it is my understanding that there is not actually any code numbers on the plans themselves, but they have the symbols and general description and all of the other indications for electrical fixtures.

Now, I believe—I am subject to correction by opposing counsel, of course—that Woolley is basing his denial of furnishing electrical fixtures on the one point that on these plans there is no code number on any specific point to indicate the exact type of fixture.

Mr. Benedict: A little bit more than the code number, your Honor, I think. The specifications provide, which Mr. McPharlin just read, that where “type numbers” are indicated on the drawings the contractor shall furnish and install all lighting fixtures in accordance with the applicable details.

Now, I have not examined the Government plans, but the plan that Mr. Woolley was given by Mr. Radkovich contained no type numbers until after he had started on the job, and then he was given a set of plans that did call for the furnishing of electrical fixtures. That is the basis of our dispute as far as furnishing electrical fixtures is concerned.

(Testimony of Ralph E. Ferguson.)

I do not know whether the Government plans—I might ask Mr. Ferguson that one question—do the Government plans, [112] Mr. Ferguson, show type numbers for electrical fixtures?

The Witness: No; they do not.

Mr. Benedict: Well, then, that is the very point, your Honor, in the whole thing here. If the Government plans do not show type numbers, it just lends support to our contention. I did not know that until just now. I know the subcontract plans did not call for it, but now we find the Government plans do not call for it.

Mr. McPharlin: Yes; I believe counsel's statement of the issue is correct. I am sorry. It was not "code number." I see they say it is "type number." And that is the issue on the fixtures, your Honor.

The Court: If you let this witness examine the plans that you referred to as having been furnished by the prime contractor to Mr. Woolley, to determine if that appears on the Government plans, I think that would be a proper inquiry.

Mr. Benedict: I think so. I think that should be.

The Court: You might do that, and if there is any ambiguity in relation to the Government plans, as to the specifications and drawings, I think the witness could testify to that.

Mr. McPharlin: Mr. Benedict, do you have the plans that you have referred to?

Mr. Benedict: Yes; I have them.

Mr. McPharlin: I think those are identical, your Honor, to the plan in front of Mr. Ferguson; and

(Testimony of Ralph E. Ferguson.)

I think if we can [113] agree on that, it will save that much time.

The Court: Yes.

Q. (By Mr. McPharlin): Will you examine this plan—

Mr. Benedict: That has not been introduced.

Q. (By Mr. McPharlin): —which Mr. Benedict has just handed me?

The Court: You can mark it for identification if you wish.

Mr. Benedict: Well, it will save time. If it is agreeable to the Court, Woolley will offer it into evidence at this time, then.

The Court: All right.

Mr. McPharlin: I only wish to make one point, that there are some notations made on there by Mr. Woolley, which, of course, we will not be bound by, your Honor.

Mr. Benedict: That is so understood.

Q. (By Mr. McPharlin): Mr. Ferguson, could you tell me if that set of plans which Mr. Benedict has just produced as to electrical work is the same as the exhibit you have in front of you?

A. It looks the same to me.

Q. Neither one of those plans show any type numbers for the fixtures, do they?

A. They do not.

Mr. McPharlin: Will you answer, or will the reporter [114] read the previous question that we asked the witness at the time the objections were made?

(Testimony of Ralph E. Ferguson.)

The Court: I think you had better mark your plans for identification.

Mr. McPharlin: Oh, I am sorry.

The Clerk: That will be E. B. Woolley's Exhibit No. 5 for identification.

The Court: Or, if you wish, it may be received into evidence if there is no objection.

Mr. McPharlin: No objection.

Mr. Benedict: It is my purpose to offer it into evidence, if the Court please.

The Court: Very well, it may be received.

The Clerk: Woolley's Exhibit No. 5 into evidence.

(Question read by the reporter as follows:

“Q. Now, Mr. Ferguson, in your opinion are the fixtures, lighting fixtures, required of the prime contractor to be furnished in these houses under this contract and plans?”)

Mr. Benedict: That was the question I believe I objected to, was it not?

Mr. McPharlin: Yes.

Mr. Benedict: I do not know whether the Court ruled on that or not. I will still maintain my objection to that question, your Honor. [115]

The Court: We had diverted the situation. I asked counsel to make a statement as to what he proposed to show by this witness at that point, and then he proceeded to read some more, and then it developed these plans were produced and the inquiry directed as to comparison of the plans, and I think that is what I was inquiring about. Now,

(Testimony of Ralph E. Ferguson.)

if the plans, Exhibit 5, conform to the plans shown, the Government plans which are made a part of the contract, I think that is proper inquiry.

Mr. Benedict: I do, too, your Honor. I did not know whether Mr. McPharlin proposed to ask this question again, calling for the opinion of Mr. Ferguson, or not.

The Court: I do not know.

Mr. Benedict: I did not want the witness to answer before I understood if that was his intention.

Mr. McPharlin: I am asking for the answer of the witness on that question, your Honor.

Mr. Benedict: The same objection, your Honor.

The Court: The question is now what? Give me your question again.

Mr. McPharlin: Oh.

Q. Mr. Ferguson, in your opinion, under the electrical section of the prime contract and the plans pertaining to the electrical work which you have in front of you, which you have stated are the same as the plans produced by Mr. Benedict— [116] now, under those is the prime contractor required to furnish the electrical fixtures for these houses on this construction job?

Mr. Benedict: That is my same objection, your Honor, without reiterating it again.

The Court: Is that calling for an opinion or calling for an interpretation of plans and specifications?

Mr. McPharlin: Well, the opinion would neces-

(Testimony of Ralph E. Ferguson.)

sarily be an interpretation, your Honor. I do not know that we could divide the two.

The Court: Let us have that read again, that particular clause that you want explained. Do you understand the question?

The Witness: Yes, sir; I think so. Do you want me to answer it?

The Court: The question is whether or not the sub-contractor is required to furnish electrical fixtures, pursuant to the Government plans, is that it?

Mr. McPharlin: Yes, and specifications.

The Court: And specifications?

Mr. McPharlin: Yes.

Mr. Benedict: Just a minute. Then, if the question is based on the requirement of the subcontractor being required to do it, I have an additional objection, your Honor, because it is an interpretation, you might say, on top of an interpretation. [117] I think that the question, as I originally understood it, was whether or not the general contractor was required to furnish the fixtures.

Mr. McPharlin: I have made quite a lengthy reference to the subcontract, wherein the subcontractor has agreed to fulfill all of the obligations of the prime contractor as to the electrical work, and it refers specifically on the subcontract:

“The specifications applicable to the work to be done hereunder are as follows:

“Specifications for Temporary Family Quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air

(Testimony of Ralph E. Fergason.)

Field, Muroc, Calif. Section 15 Paragraphs 15-0-1 through 15-26.”

Now, is that the section and the paragraph that we have been referring to, Mr. Fergason, in your testimony?

A. That is right, sir.

Q. I am asking for your opinion as to the requirement of the prime contractor to furnish electrical fixtures under this section of the specifications, plus the applicable plans that go with the specifications. I am confining it to that.

I do not think counsel means to indicate that the subcontractor was not to do the work as called for in Section 15, which is the electrical work.

The Court: I do not see any reason why the witness cannot [118] testify, even though it is obvious on the plans, whether or not the plans and specifications provide for certain fixtures. He may tell what those are. That would not be a matter of opinion. That would be a matter of fact as disclosed by the plans and specifications.

Mr. McPharlin: Yes, sir.

The Court: Now, you may testify.

A. The specification shows that the contractor, to me, furnishes the fixtures, but the plan does not tell him what kind.

The Court: That is the prime contractor, is it?

The Witness: That is right, sir.

The Court: Well, do the specifications tell him what kind?

The Witness: No, sir.

(Testimony of Ralph E. Ferguson.)

The Court: I do not know whether that is the answer you want or not.

Mr. McPharlin: We want the answer, your Honor.

Q. Mr. Ferguson, we have a similar question in reference to chime circuits. Mr. Woolley, in his claim, has included as extras a claim for installation of chime circuits. "Chimes," does that mean the door chimes, Mr. Ferguson? A. Yes, sir.

Q. In reference to that I wish to call to your attention Section 15-20 of the specifications. This is also under the electrical work. It states: [119]

"Signaling system (For Quarters). The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes, as hereinafter described and where indicated on the drawings. The Contractor shall install dual-purpose, 2-toned, bar-type musical chimes. Tones shall be amplified by two short resonating tubes. Tone bars and operating mechanism for each set of chimes shall be completely concealed by an approved ornamental housing. The signal for the rear entrance shall be distinct from that of the front entrance. Push buttons shall be of the flush type with nickel-plated trims and $\frac{5}{8}$ -inch flat pearl centers. Chimes shall be operated by means of an approved 8 to 10-volt bell ringing transformer flush mounted in the service room and connected to the nearest lighting outlet. Signal-system wiring shall be not less than No. 16 gage and shall be installed in conduit only where passing through masonry. No

(Testimony of Ralph E. Ferguson.)

splices shall be made except where they will be accessible upon completion of the building.”

Now, I will ask you the same question again in reference to the chimes. Under the specifications for the electrical work, referring specifically to the paragraph I have just read you, and under the electrical plans which you have in front of you, is the prime contractor required under the electrical [120] specifications and under the plans for the electrical work to furnish chimes in the construction of these buildings?

A. He is.

Q. In addition to the requirement in these specifications is there any reference to chimes on the plans? A. No.

Q. And the chime circuits?

A. No; there is no reference to it at all.

Q. Is there a reference to a chime circuit on the plans?

A. No; no chime circuit there—oh, yes. Let me see, now. Wait a minute. I don't see any chime circuit on the plan. Let me see. Oh, yes; here it is over here. Yes; it is on there.

Q. Mr. Ferguson, these are the original general plans or the general plans for the contract, aren't they? A. That is right.

Q. Isn't it customary and isn't it also required under the prime contract that shop drawings or plans showing greater detail are furnished by the particular trades?

A. That is usually the case; yes.

(Testimony of Ralph E. Ferguson.)

The Court: When you say "shop drawings" you mean working drawings?

Mr. McPharlin: Yes.

The Witness: That is right, sir.

The Court: What? [121]

The Witness: That is right, sir.

The Court: That is, working drawings as the work progresses?

The Witness: It shows in detail a little more than the general plan does usually.

Mr. McPharlin: There is another item in the Woolley's claim in reference to phone circuit labor which we do not dispute, your Honor, an item of \$133.33.

The Court: What does the contract say with reference to furnishing the Government with any further plans or additional plans?

Mr. McPharlin: Yes; it has that requirement which I referred to before, your Honor, the requirement for drawings. Do you recall where that was, Mr. Ferguson? I had it here once.

The Court: There is a provision in the contract, is there, requiring further specifications?

Mr. McPharlin: Yes; requiring that further drawings be submitted. Do you recall where that is, Mr. Ferguson?

The Witness: Not right now.

The Court: Well, it is not necessary at this time.

Q. (By Mr. McPharlin): Mr. Ferguson, after the work was started or commenced up at Muroc

(Testimony of Ralph E. Ferguson.)

isn't it true that it was discovered that the original electric plans would require some adaptation to the design of the building, the way it was laid out upon the project, or are you familiar with that?

A. What is that, now? [122]

Q. After they went up on the project and work was commenced, I believe, the latter part of July, isn't it true that some minor changes or adjustments had to be made in the electrical drawings to conform to the design of the building?

A. Not that I recall.

Q. Did you have any part in any such conference or meeting up there where there had to be any changes in the electrical plans or the conduits or whatever is involved, due to the actual design of the building?

A. Well, I don't remember now of any.

Q. I will hand you a document titled "Radkovich's Exhibit I," which is a blueprint or an electrical plan, and ask if you are familiar with that?

A. Yes; I have seen a plan like that.

Q. Did you have any part, yourself, in the preparation of that? A. No, sir.

Q. Is that the electrical plan for these concrete houses that they were constructed under?

A. I believe it is. It looks like it.

Q. That shows the chime circuits in greater detail, doesn't it? A. Yes, sir.

Q. Do you notice any other differences on that from the other set of plans, the original set of plans you have in front [123] of you?

(Testimony of Ralph E. Ferguson.)

A. Yes; I do.

Q. And what are they?

A. At the main entrance there is some shelves at the back of this main entrance, and the original plan shows two lights, fluorescent fixtures, and this plan shows three lights there and they are pull chains; and it also shows your push buttons at the back door and the front door for your chimes.

Q. The original plans, I believe you mentioned, showed two lights, fluorescent, and the revised plan shows three lights, is that correct?

A. That is right.

Q. Those two fluorescent lights that are shown on the original plan, isn't it true that they were later eliminated, Mr. Ferguson, in the houses?

A. That is right; yes. This eliminates them right here.

Q. And when those two fluorescent fixtures were eliminated on this revised plan, there was added one pull-chain fixture, is that correct, or doesn't it show?

A. These two were eliminated and three pull-chain fixtures were put in.

Q. Then the fluorescent were eliminated altogether and they were replaced by three pull-chain fixtures, is that correct? [124]

A. That is right, that is right.

Q. Three pull-chain fixtures, is that the way it was eventually built?

A. That is right, sir.

Mr. McPharlin: We will offer next into evidence

(Testimony of Ralph E. Ferguson.)

a blueprint entitled "Record Drawing—As Constructed" and ask that this be admitted as Radkovich's next exhibit in order.

The Clerk: Into evidence. Admitted, your Honor?

The Court: It may be received.

The Clerk: This is Radkovich's Exhibit J into evidence.

Q. (By Mr. McPharlin): Mr. Ferguson, I will hand you Radkovich's Exhibit J, which is a blueprint entitled "Record Drawing—As Constructed." Is that the drawing of the electrical work on these units as they were constructed? A. It is.

The Court: As they were constructed?

The Witness: As it was built; yes, sir.

Q. (By Mr. McPharlin): In reference to light fixtures, is that the plan identical to the original plan, with the exception of those three fluorescent lights that we mentioned?

A. I believe it is. It seems to be.

Q. It also shows the chime circuits as reference was made to on the original plans?

A. Yes, sir.

Q. And it shows that the two fluorescent closet lights [125] were eliminated? A. Yes, sir.

Q. And that at that location it shows that three pull-chain lights were added? A. Yes, sir.

The Court: Is that claimed as an extra?

Mr. Benedict: The added closet light is claimed as an extra; yes. We claim an added closet light.

Mr. McPharlin: There has been no credit given

(Testimony of Ralph E. Ferguson.)

or shown for the elimination of the two fluorescent lights, your Honor, but there is a claim made for an added closet light.

Q. Briefly, what are those closet light fixtures that were installed? Can you describe them very briefly, what they are?

A. Well, they are just an ordinary light, you might say, on a drop cord, about as simple a light as you can get, with a pull-chain on it that turns it on and off.

Q. With a pull-chain?

A. That is right.

Q. That is the three lights that they put in?

A. It was, yes.

Q. And previous to that the plans called for two fluorescent lights and those were eliminated?

A. That is right, sir.

Q. There has been a further claim made by the subcontractor as an extra consisting of two additional small [126] units necessary to replace two unacceptable units. Do you have any knowledge of what that is about, Mr. Ferguson?

A. Of units of what?

Mr. McPharlin: I wonder if we might ask counsel for Woolley?

Mr. Benedict: That is when the roofs in these buildings fell in, the units for those, I believe.

Mr. McPharlin: What type of units?

Mr. Benedict: Kitchen units.

Mr. McPharlin: What type of kitchen units, the electrical wiring in the kitchen?

(Testimony of Ralph E. Fergason.)

Mr. Benedict: It was all the rough wiring in the building.

Mr. McPharlin: I see.

Q. I believe you made previous reference to two occasions where the roofs settled?

A. Yes, sir.

Q. There were two occasions?

A. Yes, sir.

Q. And you have previously stated that that may have been due to the near zero weather?

A. Yes. I would say it probably could have, yes.

The Court: This change in these lights was made in each house, is that correct?

The Witness: Yes, sir. Yes, sir; a hundred houses.

Mr. McPharlin: There are 100 identical houses, as I [127] understand it, your Honor.

The Court: Yes, sir.

Q. (By Mr. McPharlin): Mr. Fergason, to your knowledge, was the prime contractor ever paid any extra compensation for extras by reason of any electrical work?

A. I don't think so.

Mr. McPharlin: No further questions.

Redirect Examination

Q. (By Mr. Benedict): In reference to the two buildings where the roofs fell in, Mr. Ferguson, did Radkovich have any heat in the buildings?

A. Well, I would say he did. He was supposed to have.

(Testimony of Ralph E. Fergason.)

Q. You spoke of the original plans calling for fluorescent lights. Do you base that statement on your interpretation of the contract that the contractor was obligated to furnish fixtures, or do you base it on the fact that the plans themselves show fluorescent lights?

A. The plan so shows fluorescent lights.

The Court: I did not get that.

The Witness: The plans themselves show the fluorescent lights.

The Court: All right.

Q. (By Mr. Benedict): Do they show the type of fluorescent lights? [128]

A. No, sir. No, sir.

Q. In connection with——

The Court: Pardon me a moment. Did that change-over require any additional wiring, or was it merely a substitution of a drop light for fluorescent fixtures?

The Witness: It took a little extra wiring, sir.

Q. (By Mr. Benedict): In reference to Radkovich's I from which you have previously testified, I call your attention to the notation on the blueprint "Note: Electrical fixtures in accordance with list to be submitted for approval." Was that notation on the original set of plans?

A. No, sir.

Q. It is true, is it not, Mr. Fergason, that the type of electrical fixtures governed the price of the fixtures? A. I would say that is right.

Q. Electrical fixtures run from a merely nom-

(Testimony of Ralph E. Ferguson.)

inal price up to quite expensive items, do they not?

A. That is right, sir.

Q. And that depends on their type, is that not true?

A. That is right, sir.

Q. Do you recall whether or not there was another plan that was also called "a revised electrical plan" that was submitted by Radkovich prior to Radkovich's I?

A. I couldn't tell you about that. I don't remember it.

Q. You don't remember. I show you a so-called "Revised [129] Electrical Plan" or, rather, a photostatic copy of one, and ask you if that refreshes your recollection as to whether or not there had been another working drawing submitted?

A. Well, these are not the same.

Q. That is true. Do you remember having seen this one before, the one I have just shown you?

A. No; I don't think that I do. No; I don't remember of seeing it.

Mr. Benedict: I would like to have the drawing I have just shown the witness marked for identification, if the Court please.

The Clerk: Woolley's Exhibit No. 6 for identification.

Q. (By Mr. Benedict): Mr. Ferguson, I show you copy of a letter dated February 18, 1948, directed to Radkovich Company and apparently bearing your signature or a copy of your signature.

A. Yes, sir.

Q. I ask you if the original of that letter was

(Testimony of Ralph E. Ferguson.)

written to Wm. Radkovich Company about the date it bears? A. It was.

Mr. Benedict: I would like to offer that into evidence, then, if the Court please, as Woolley's next exhibit in order.

The Clerk: Admitted, your Honor?

The Court: Admitted.

The Clerk: This will be Woolley's Exhibit No. 7 into [130] evidence, copy of a letter.

Q. (By Mr. Benedict): Mr. Ferguson, would you examine again the drawing of the work as completed, I believe it is entitled, and tell me if it is not true that that drawing does not indicate that those lights that you testified to heretofore are operated by pull-chain are actually on a switch?

A. They are on a switch and a pull-chain, too, I believe.

Q. They operate both ways, then?

A. I believe that is right. The switch is right here at the door, you see, that turns on.

Q. Isn't it a three-way switch that they are operated from? A. I believe it is.

Q. Then you would wish to change your testimony in that respect?

A. Well, but they have that pull-chain, too. There is the pull-chain right there, "PC," pull chain, you see.

Q. But there is also the three-way switch?

A. I believe that is right. I wouldn't swear to that, though.

Mr. Benedict: I believe that is all, your Honor.

(Testimony of Ralph E. Ferguson.)

Mr. McPharlin: I have just a few more questions if we have time, your Honor, if I may.

The Court: Very well. [131]

Recross Examination

Q. (By Mr. McPharlin): The type of electrical fixtures that were placed in the house, they were in accordance with a list furnished by Mr. Woolley, the subcontractor, weren't they, Mr. Ferguson?

Mr. Benedict: Just a minute now, if the Court please. That is, if the witness knows that they were furnished by Mr. Woolley. We did furnish a list, your Honor, and we did it under circumstances where we made our position clear that we were not obligated to furnish them or install them.

The Court: Do you know?

The Witness: I do not know, sir.

Mr. Benedict: I believe the letters that were introduced will show that. I do not have any objection to it, as far as that goes, if he knows.

The Court: He says he does not know.

Q. (By Mr. McPharlin): Electrical fixtures for this type of construction, are they pretty well standardized?

A. Well, in this case I would say no. I think this is the first buildings we had like this, and I wouldn't say it was standardized.

Q. In this type of building you would not have ceiling lights, would you?

A. We did not have; no.

Q. But wall brackets? [132]

(Testimony of Ralph E. Ferguson.)

A. That is right, sir.

Q. The Government did not require any gold-plated wall brackets or anything of the kind, did it?

Mr. Benedict: Just a minute, if the Court please. It is not what the Government required. Well, I withdraw the objection.

The Court: Counsel asked that question with a smile. I do not think he was very serious.

Mr. McPharlin: No.

Q. Do you know which is the most expensive type of fixture, a fluorescent or a common pull-chain fixture?

A. Well, I would say the fluorescent costs more money, but I would not guarantee it. You can get various prices on both kinds of them.

The Court: You are talking now about just the bulb or whatever you may call it?

The Witness: The fixture and bulb and all.

The Court: Yes.

Q. (By Mr. McPharlin): Fluorescent bulbs always require a fixture of some type, don't they?

A. To hold them, yes.

The Court: As a matter of general information, there is a tube that goes into a fixture?

A. Yes, sir.

The Court: And that has a frame, a framework of some [133] kind?

The Witness: Usually that is right; yes, sir.

The Court: And that costs more?

The Witness: That fixture serves that tube the

(Testimony of Ralph E. Ferguson.)

same as a regular bulb would into a socket.

Q. (By Mr. McPharlin): Mr. Ferguson, did Mr. Woolley while he was on this job coordinate his men with the progress of the other subcontractors and the prime contractor?

A. Yes; I would say he did.

Q. In other words, did he adjust his crew to the amount of work to be done?

A. I would say he did; yes.

Q. In this type of large construction is it true that at various times you will need quite a number of men and at other times, when it slows up, you won't need as many electricians? Isn't that true?

A. Well, yes, to some extent.

Q. He had varying crews of men; I mean varying numbers of electricians on the job?

A. Well, not too much. He had almost a steady crew all the way through the job, I would say.

Q. Did he have an excessive crew? Did he have too many men? A. I don't think so.

Q. In other words, the crew that he had was pretty well [134] adapted to the amount of work that they had to do?

A. I think so; yes.

Q. Therefore, he did not have a lot of his electricians standing around idle for an unusual length of time? A. I would say that is right.

Mr. McPharlin: No further questions.

Redirect Examination

Q. (By Mr. Benedict): Mr. Ferguson, in your

(Testimony of Ralph E. Fergason.)

opinion would Woolley have been able to have completed that job by April 15, 1948, in the electrical work with the men he had there?

A. He couldn't, because the buildings were not ready for him to put his work in.

Q. Assuming the buildings had been ready, do you think he could have done it?

A. With the number of men he had?

Q. Yes.

A. Well, I don't know. He might have. It might have taken another man or two.

Mr. Benedict: That is all.

Mr. McPharlin: Just a moment.

Recross Examination

Q. (By Mr. McPharlin): In respect of that, I believe you have already testified that his crew was adapted to the work that was going on? [135]

A. Yes; that is right.

Q. Therefore, if that progress of that work had been increased, say, two-fold, if the houses had been going up twice as fast, why, he would have, accordingly, had to have had a larger number of electricians, wouldn't he?

A. Why, sure; he would probably have had to have twice as many men.

Mr. McPharlin: Yes. That is all.

The Court: Anything further?

Mr. Benedict: That is all.

Mr. McCall: Could I ask just one question, your Honor?

(Testimony of Ralph E. Ferguson.)

The Court: Yes, proceed.

Further Direct Examination

Q. (By Mr. McCall): Mr. Ferguson, in the amounts that you calculated and gave to Mr. Radkovich and to Mr. Woolley as the amount due him under the various estimates, you did that as an accommodation to Mr. Radkovich and Mr. Woolley and the other subcontractors?

A. That is right, sir.

Q. It was not part of your job?

A. No, sir.

Q. And the amounts that you approved were after 10 per cent was deducted?

A. No. When I made an estimate I put down the figure, [136] and then I took out the 10 per cent later, you see, when it goes on the estimate.

Q. Then the estimates that I showed you this morning where you allowed certain amounts, was that after deducting the 10 per cent?

A. That was the amount the contractor paid for those fixtures that you show there, see. For instance, that \$21,000 and something, I allowed him that full amount, but when I put it on the estimate I have to take off 10 per cent, don't you see?

Mr. McCall: That is all.

Mr. McPharlin: No further questions.

The Court: Anything further?

Mr. Benedict: No, your Honor.

The Court: We will take our noon recess.

Mr. McCall: May this witness be excused?

The Court: Are you all through with him?

Mr. McPharlin: Yes, your Honor. I had one question. I believe I have one other letter, which I do not have available, from Mr. Ferguson pertaining to this work, that I have sent for and I will have this afternoon. But I think if you can see it, you can probably stipulate to it without the necessity of my calling Mr. Ferguson to attest to his signature.

Mr. Benedict: Oh, I think so, yes.

Mr. McPharlin: That is all. [137]

The Court: You may be excused. We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, May 18, 1950.) [138]

Los Angeles, California,

Thursday, May 18, 1950, 2:00 p.m.

Mr. McCall: I believe we finished with the engineer, and I believe that Mr. Radkovich was on the stand yesterday. May I ask if that is the right pronunciation; is it "Radovich" or it is "Radkovich"?

Mr. Radkovich: Either one, it doesn't make any difference. The "k" is supposed to be silent. That is the reason they say "Radovich" all the time.

Mr. McCall: Would you take the stand, then Mr. Radkovich?

WILLIAM RADKOVICH

Cross Examination—(Resumed)

Q. (By Mr. McCall): Mr. Radkovich, I show you what is in evidence as Radkovich Exhibit F, which is comprised of several letters or copies of letters which your counsel put in evidence yesterday, and point you to one letter here that is addressed to "Glens Falls Indemnity Co." and dated June the 10th, 1948, on the stationery of "Wm. Radkovich Company, Inc.," and ask you if your company sent that letter out?

A. As far as I know, yes.

Q. And then there is a letter addressed to "Mr. E. B. Woolley," the subcontractor, dated June the 10th, and down at the bottom of that letter it purports to have sent a copy to the Glens Falls Indemnity Company, his surety, and do you [139] know if that letter went out?

A. As far as I know, yes.

Q. I hand you herewith a copy of a letter I have just shown to your counsel, which purports to be a reply to the two letters of June the 10th, 1948, and ask you if your company received that letter?

A. I suppose they did. I don't know. Mr. Parks was handling that.

Mr. McCall: Shall we wait for Mr. Parks or shall we save a little time and stipulate that this letter was received by Radkovich Company?

Mr. McPharlin: If you say it was mailed. It is your letter, isn't it, Mr. McCall?

(Testimony of William Radkovich.)

Mr. McCall: It was mailed and I have a reply from it.

Mr. McPharlin: Well, then, let us stipulate that it was received.

Q. (By Mr. McCall): I show you what purports to be an acknowledgment—not a reply, but an acknowledgment—of that letter, and ask you if that was sent out by your office, Mr. Radkovich?

A. Yes; it has been, by Mr. Parks.

Q. In reply to the two letters of June the 10th, this letter of June the 11th was addressed to——

May I offer this, since it has been acknowledged, as defendant Glens Falls next exhibit in order?

The Court: It will be received.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit No. 8 into evidence.

Mr. McCall: And then the one from Radkovich Company addressed to "John E. McCall" signed by Radkovich Company by "E. H. Parks" which has just been recognized by Mr. Radkovich, as the next exhibit in order.

The Clerk: Admitted, your Honor?

The Court: It may be admitted.

The Clerk: That will be Glens Falls Indemnity Company's Exhibit No. 9 into evidence.

Q. (By Mr. McCall): Now, Mr. Radkovich, I hand you Glens Falls Exhibit No. 8 and call your attention to the first paragraph which refers to those two letters in evidence of June the 10th, and that part of this letter of June the 11th to Radkovich Company in behalf of Glens Falls and signed by

(Testimony of William Radkovich.)

“John E. McCall” which says:

“Please give me the following information:

“1. The nature of default or defaults complained of and when the alleged default or defaults first came to your attention.

“2. Has the subcontract been increased or decreased by additions or deductions, and if so to what extent?”

And several more questions there, but to save time, did [141] you ever reply to any of those questions?

A. Myself, personally, no, but I suppose Mr. Parks did, though.

Q. You suppose he did? A. Yes.

Q. You do not know if he did?

A. No; I do not.

Q. Then I hand you Mr. Parks' letter which acknowledges receipt of that and states that:

“We will obtain the information and forward it to Mr. Shafer who will in turn forward it to you.”

Do you know if that information was even given to the Glens Falls or its attorney?

A. No; as far as myself, no.

Q. I believe you stated yesterday that you loaned Mr. Woolley \$4,000 at the time you paid him \$5,000 on the first estimate because he told you that he could not get along without it, is that right?

A. That is correct.

Q. And you believed his statement and that is why you made him the loan, is that right?

A. For the loan, yes, personal loan, yes.

(Testimony of William Radkovich.)

Q. Did you notify the Glens Falls Indemnity Company of this loan?

A. The personal loan? [142]

Q. Yes.

A. No; I did not.

Q. Referring you to that letter before you there, June the 10th, which states that Mr. Woolley was in default, was that letter sent out by you or at your suggestion?

A. It was sent out by Mr. Parks.

Q. At your suggestion?

A. I suppose it was.

Q. What default did you have in mind when you sent that letter out?

A. Mr. Parks handled that. I wouldn't know.

Q. You would not know what he was talking about? A. No.

Q. Do you personally know of any default whatsoever on the part of Mr. Woolley in the performance of his subcontract job?

A. On the job itself?

Q. Yes.

A. Not only that he was holding up the job at certain times, that is all, and he couldn't hire the men because he didn't have the money, and we was helping him take care of the pay rolls.

Q. Is that what you know of your own personal knowledge or from what someone else told you?

A. No. I was with Mr. Woolley, myself, several times. [143] Whenever he come for money he always come to me about the money proposition.

(Testimony of William Radkovich.)

Q. When did it first come to your attention that he was holding up the job?

A. Oh, Mr. Parks—well, I can't say when or anything else. I mean I don't remember when it was, but Mr. Parks, he was always in telephone conversation with him, and he told me many times that the job was being held up.

Q. That was what Mr. Parks told you. You do not know it of your own personal knowledge?

A. No; I don't.

Q. All right. But you say you were with Mr. Woolley many times?

A. In the office.

Q. In the office?

A. That is right.

Q. And what time, if any, did you learn from being with Mr. Woolley, or otherwise, that he was holding up the job?

A. Well, the times I went up. Probably I would go up to the job, maybe once a month, if I could arrange to go up there at that time, and he wouldn't have—he couldn't even get men, or at certain times he couldn't even get them through the unions. It was not his fault.

Q. What month was the first time that you noticed that?

A. I wouldn't know. [144]

Q. Well, let's see; do you remember when you started the job?

A. Approximately.

Q. And do you remember when Mr. Woolley went on this job?

A. Just about.

Q. What time was that?

A. Around July or August.

Q. All right. Then with that date in mind, could

(Testimony of William Radkovich.)

you state to the court when he first held up the job, of your own knowledge?

A. At first he didn't hold up the job.

Q. All right. How long was it before he did hold up the job?

A. Well, I would say 30 or 60 days—60 days later.

Q. Sixty days later. Would that be the latter part of September? A. It could be.

Q. Would that be before or after the first estimate was paid to him of \$5,000? A. After.

Q. How long afterwards?

A. I wouldn't know.

Q. What makes you know it was after you paid him the first estimate, Mr. Radkovich? [145]

A. Well, to be frank, I don't even know that, to be truthful. I don't know when it was. That situation Mr. Parks was handling, absolutely, every bit of that.

Q. As a matter of fact you don't know of your own knowledge that he ever held up the job in any way, do you?

A. Oh, several times I know. Three or four times I know, myself, because I was on the job myself when I saw he couldn't get the materials on the job in time or something else, delayed by men. I know several instances where he called unions and he couldn't get men, even, to work on the job.

Q. You cannot state, though, to the court, even what month you first noticed that?

A. No; I could not. No.

(Testimony of William Radkovich.)

Q. The \$4,000 which you loaned Mr. Woolley is included in the estimates which you have stated here that you paid him, is it not?

A. In total estimates?

Q. Yes. A. In total money we paid him?

Q. Yes. A. That is right.

Q. You heard Mr. Ferguson's testimony with reference to allowances that he made after the first estimate to various subcontractors?

A. That is right. [146]

Q. And you agree with him that he did that as an accommodation only?

A. Nothing else but accommodation.

Q. And it was not part of his work?

A. He was not even supposed to do it.

Q. But if he had not done it, there was no way in the world that you could have determined what each subcontractor under Item 3 was entitled to?

A. That was exactly right.

Q. So if he had not made those slips up for you showing the amount in dollars and cents which you owed the subcontractors, you would have had no way to calculate that, would you?

A. No; I wouldn't, because I didn't know anything about electrical work at that time. I mean so far as the rough work, what it amounted to, because it was never broken down.

Q. I believe you subbed four items out of the five which come under Item 3 of the contract, is that right? A. That is right.

Q. The fifth part, which was the pouring of con-

(Testimony of William Radkovich.)

crete and erecting the building, was retained by you? A. That is right.

Q. So after you paid the subcontractors the amounts coming to them as shown you by Mr. Ferguson, the engineer, then the balance of the money was yours?

A. If there was anything left; yes. [147]

Q. Out of each estimate? A. That is right.

Q. Are you familiar with the various plans which have been introduced here into evidence, personally? A. Personally, no.

Q. You do not know whether the plans were changed after the subcontract was signed or not?

A. No; I don't know anything about the plans, absolutely nothing, because I wasn't handling that part of it. I was handling the financial part and that was enough for myself.

Mr. McCall: Excuse me just a second until I speak to my associate. That is all, thank you.

Mr. McPharlin: Only a few other questions.

Recross Examination

Q. (By Mr. McPharlin): I believe you have previously stated that when a dispute arose about the fixtures, why, Woolley walked off the job, is that correct? A. As far as I know; yes.

Q. Was that a short time?

The Court: I am sorry. I didn't get your question.

(Question and answer read by the reporter.)

Q. (By Mr. McPharlin): Was that a short time

(Testimony of William Radkovich.)

before that letter to the Glens Falls of the early part of June?

A. I couldn't tell you anything about letters.

Q. Do you remember about when it was that Woolley walked off the job?

A. I don't know the dates or the month, even.

Mr. McPharlin: That is all. No further questions.

Mr. Benedict: I have no further questions.

The Court: Anything further?

Mr. McCall: No, thank you, your Honor.

The Court: That is all.

Mr. McPharlin: Mr. Radkovich and Sureties will call as their next witness Mr. E. H. Parks.

EUGENE H. PARKS

called as a witness by defendants and cross-claimants, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Eugene Parks.

The Clerk: Is the middle initial H?

The Witness: H.

Direct Examination

Q. (By Mr. McPharlin): What is your occupation, Mr. Parks?

A. I am associated at the present time with the General Contractors.

Q. In the contracting business?

A. That is correct.

(Testimony of Eugene H. Parks.)

Q. Were you previously employed by Wm. Radkovich Company? [149] A. That is correct.

Q. During what time were you employed by the Radkovich Company?

A. From June, 1947 until March of 1949.

Q. And you were with Radkovich Company during all of the time of this construction job which is in question here? A. During the entire period.

Q. Mr. Parks, I hand you a drawing which is captioned "Revised Electrical Plan," August 27, '47, which is on tissue paper, and ask you if you have ever seen this before?

A. Yes. This is the tracing of the electrical working drawings that Mr. Woolley and Mr. Higuera brought into my office from the job.

Mr. McPharlin: I will offer this into evidence as Radkovich's next exhibit in order.

The Court: It may be received. What was the date of that?

Mr. McPharlin: "8-27-47."

The Clerk: That will be Radkovich Company's Exhibit K into evidence.

Q. (By Mr. McPharlin): Now, Mr. Parks, you have stated that this was brought into your office by Mr. Woolley and Mr. Higuera?

A. That is correct.

Q. Was Mr. Higuera an employee of Mr. Woolley's, to your [150] knowledge?

A. To the best of my knowledge, he was an employee of Mr. Woolley's.

Q. And can you recall about when that was

(Testimony of Eugene H. Parks.)

brought into your office by Mr. Woolley and Mr. Higuera?

A. It was brought in by Mr. Woolley and Mr. Higuera around or on August the 27th or 28th of '47.

Q. Was there any conversation between you and Mr. Woolley and Higuera at the time that was brought into the office to you?

A. Prior to Mr. Woolley and Mr. Higuera coming into my office with this plan, I received a long-distance call from the job at Muroc in which I was notified at that time that a plan had been prepared and that Mr. Woolley and Mr. Higuera were going to bring it into my office and I was to anticipate this——

Mr. Benedict: Just a minute, if the court please. I object to this conversation the witness is narrating as not in response to the question and would be hearsay.

The Court: Sustained.

Q. (By Mr. McPharlin): Who was this conversation with, do you recall?

A. I don't recall.

Q. Was it with Mr. Woolley or Mr. Higuera?

A. I do not recall whether I discussed this with them before they came into the office. [151]

Q. After they brought it into the office did you have any conversation with Woolley and Higuera at the office?

A. Yes; I had conversation with Mr. Woolley and Mr. Higuera in regard to this plan. It was

(Testimony of Eugene H. Parks.)

noted when I went over this drawing with Mr. Higuera and Mr. Woolley, they pointed out to me the differences between this drawing and the contract drawing.

Q. What else was said?

A. They brought up the question of the fixtures at this time. They brought up the question of the telephone outlet at this time, and they brought up the question of the location of the signaling system, the push buttons, and the location or the addition of a pull-chain light in the closet in the living room.

Q. Then did you and Mr. Woolley and Mr. Higuera take this plan anywhere?

A. I called the U. S. Engineers and made an appointment to bring this plan down to their offices and submit this plan through their offices in order to get an approval by the U. S. Engineers of this working drawing.

Q. Did you then go to the U. S. Engineers' office with this drawing?

A. Then Higuera, Woolley and myself, in their automobile, went down to the U. S. Engineers' office.

Q. Did the three of you go in and see anyone in the [152] U. S. Engineers' office?

A. We went into Mr. McCumber's office.

Q. Who is Mr. McCumber?

A. Mr. McCumber's exact title I don't exactly recall, but it was Mr. McCumber's responsibility to take care of this type of matter in submitting drawings and channeling them through the U. S. Engineers to obtain approval.

(Testimony of Eugene H. Parks.)

Q. Was Woolley and Higuera present when you were in Mr. McCumber's office? A. Yes.

Q. Was there any conversation in reference to these drawings while all of you were present in this office?

A. Yes. We discussed the changes that were indicated on this drawing, changes that were necessitated by construction problems on the job, the addition or the showing the location of the push-button system, the telephone conduit, and the pull-chain and the fixtures.

Q. During this conversation at the U. S. Engineers' office did Woolley mention anything about fixtures on that? A. Yes; he did.

Q. If so, what?

A. He brought up the question of furnishing the fixtures at this project.

Q. How did he bring it up or what did he say, if you recall? [153]

A. His exact words I do not recall, but he brought it up in the manner that as far as he was concerned, he was not supposed to furnish or hang the fixtures.

Q. Did Mr. McCumber make any reply to Woolley and you at that time?

A. Yes. Mr. McCumber made the reply that Woolley, as a subcontractor for the general contractor, was not recognized in his office, and he was there as a matter of accommodation and convenience; and that that was a matter to be settled between the contractor and the subcontractor.

(Testimony of Eugene H. Parks.)

Q. Did McCumber make any statement as to any requirements of the prime contractor to furnish electrical fixtures, in the presence of Woolley at that time?

A. Mr. McCumber obtained a set of these specifications for the job at Muroc and read to us, particularly to me, that particular section of the electrical specifications which referred to the fixtures; and, as far as I could determine from Mr. McCumber's statements, it was the intent of the specifications and the intent and meaning of Mr. McCumber's statements to me that the prime contractor was being held responsible for the furnishing and installing of electrical fixtures.

Q. In reference to these drawings do you know, of your own knowledge, if any changes were made from the original plans in evidence due to the design of the house or the forms on the job? [154]

A. Yes. Perhaps Mr. Woolley's testimony, later, will back up my statements. It was my understanding that—may I see the original plan, the original electrical contract drawing and plan?

Q. I will hand you Radkovich's Exhibit H; is that what you want?

A. This is the drawing I am referring to. Radkovich's Exhibit H indicates on the electrical diagram that there are located in the living room electric heaters located under the windows, whereas Radkovich's Exhibit in evidence K indicates that those electrical heaters were changed from that location under the windows to the location to the right

(Testimony of Eugene H. Parks.)

or left-hand side of the windows, respectively. And I was told that the reason that change was necessary was due to the fact that the size of the heaters and the size of the windows would not permit the electrical heater to be installed under the window as it is shown on Exhibit H, which was the original contract drawing. Therefore, this Exhibit K is different from the original contract drawing in that respect.

Do you wish other changes detailed?

Q. No. You might state just generally whether those working drawings were required?

A. I made a request of Mr. Woolley's office when the subcontract was signed and at the time Mr. Woolley was given a written notice to proceed it detailed in there the general [155] instructions that he was supposed to follow in getting his work started on the job. One of the conditions or one of the responsibilities that I had with the Radkovich organization was to see that all of the things required of the prime contractor under his contract in reference to obtaining engineering information, the submission of shop drawings from the subcontractor, and the submission of a list of materials for approval. In regard to that I contacted Mr. Woolley or Mr. Woolley's organization in regard to submitting shop drawings.

This drawing that I am referring to here, this revised electrical plan, is what was submitted to me to obtain approval on from the U. S. Engineers, was that shop plan or working drawing.

(Testimony of Eugene H. Parks.)

Q. Mr. Parks, I will hand you a copy of a letter dated July 26, 1948, addressed to "Wm. Radkovich Company, Inc.," from R. E. Ferguson, resident engineer, and ask you if you have ever seen that letter before?

A. Yes; I recall of seeing this letter.

Q. Do you recall receiving that at the office of Radkovich Company? A. That is correct.

Mr. McPharlin: I will offer this into evidence as Radkovich's next exhibit in order.

Mr. Benedict: If the Court please, I did not realize this morning when Mr. McPharlin mentioned that he had a letter from Mr. Ferguson the nature of the letter. Apparently it [156] is an impeaching letter of Mr. Ferguson's. I think that under the circumstances it should have been shown to Mr. Ferguson. And I object to it on the ground that it is incompetent, irrelevant and immaterial, and no foundation laid for it.

I have to take that position because I do not want to take counsel by surprise, and I did not realize that that was the purpose of the letter, which is the only purpose I can see that it would serve.

The Court: Mr. Ferguson was your witness?

Mr. Benedict: He was my witness, your Honor. He was my witness. And it was written by Mr. Ferguson. It contains certain statements that would be in contradiction of what he said on the stand. Now he has been excused and we have no way of asking him about the inconsistency set forth in the letter.

Mr. McPharlin: I would not say that it is an

(Testimony of Eugene H. Parks.)

impeachment of Mr. Ferguson's testimony. It is a further clarification of his testimony, I believe. I am sorry, I did not have the letter myself, Mr. Benedict. At the time of our deposition I had been notified over the phone of this letter and I had requested it, and I had my girl go pick it up at the office and I did not get it until this noon.

Mr. Benedict: This is the first I have seen of it. We have gotten along very well in all our exhibits, and I do not want to be taking a super-technical view of it; but it does [157] contain certain statements that are a surprise to me and I feel that I have to do that.

The Court: Do you want to call Mr. Ferguson back?

Mr. Benedict: I feel that he should be called back, because it certainly contains some statements in there that are inconsistent with what he said.

The Court: I have not seen the letter and I do not know what it is.

Mr. McCall: I suggest that the letter be shown to the Court.

Mr. Benedict: Yes. I have no objection to the Court seeing the letter.

Mr. McPharlin: Yes. I do not think it is of that much importance.

Mr. Benedict: I have asked the Court to rule on it, so I would like to have your Honor read the letter.

The Court: Suppose you tell me what is in the letter.

(Testimony of Eugene H. Parks.)

Mr. Benedict: In brief, the letter purports to state that Woolley is one of the subcontractors that is behind in his work, which was absolutely inconsistent with what Mr. Ferguson stated on the stand this morning, that Mr. Woolley did not hold up the job. And, as I say, that is the first I had heard of any such statement as that from Mr. Ferguson.

The Court: Well, I do not know why Mr. Ferguson cannot be impeached by opposing counsel.

Mr. Benedict: He can be, your Honor, but he should be impeached by having the letter shown to him. That is the proper way to do it. I will admit that there is no question about it.

Mr. McPharlin: Well, I don't know that it is of that much importance.

The Court: No doubt Mr. Ferguson will acknowledge the letter if he wrote it.

Mr. Benedict: I would take Mr. McPharlin's statement for it, if he can testify that it comes from Mr. Ferguson, I am willing to rely on his word insofar as that part is concerned. I am not raising that.

Mr. McPharlin: In other words, as I understand it, you would call Mr. Ferguson here to make an explanation, rather than to have him, as you feel, impeached without being able to explain.

The Court: Just a little louder, please.

Mr. Benedict: That is right. That is right. If I had known the nature of it this morning when you mentioned it to me, but I did not know it contained anything of that nature.

Mr. McPharlin: Mr. Ferguson, as I understand,

(Testimony of Eugene H. Parks.)

has gone back to La Verne, California.

The Court: To where?

Mr. McPharlin: To La Verne. And I don't know that it is of that importance. If you want to insist upon your [159] objection, Mr. Benedict, why, I will withdraw the exhibit.

Mr. Benedict: I feel that I need to, your Honor, because, as I say, it takes me by surprise here.

Mr. McPharlin: I am sorry, too, that I did not have it, because I did not want to take Mr. Benedict by surprise.

Mr. Benedict: Mr. Ferguson may well have an explanation for it, but I do not know what it is.

On further consideration of the matter, your Honor, in view of the fact that that letter was written after April 15th, when Woolley was supposed to have completed his contract, and in order to keep away from a lot of these side issues, I will withdraw my objection and let the letter come in.

The Clerk: That will be Radkovich's Exhibit L into evidence.

Mr. McPharlin: Mr. Parks, did you have anything to do with the payments made to Mr. Woolley, the subcontractor? A. No; I didn't.

Q. What were your general duties as an employee of the Radkovich Company, Mr. Parks?

A. I handled the bulk of the correspondence between the prime contractor and the Government agency, and between the prime contract and the subcontractors. I handled the co-ordination of the delivery of materials and the purchasing of materials

(Testimony of Eugene H. Parks.)

for this particular project and other projects; and, in general, assisted Mr. Radkovich in what other duties he saw [160] fit for me to perform.

Q. You have testified as to a drawing on tissue paper that was brought in to you by Mr. Woolley and Mr. Higuera. I will hand you now a blueprint which is marked Radkovich's Exhibit I and ask you if that is the same as the tissue paper drawing?

A. The blueprint is the same except for one item.

Q. What item is that?

A. On the tissue paper tracing there appears at the top of the tracing a notation.

Q. Are you referring to that pencilled notation way up on the top? A. That is correct.

Q. Just what does that say?

A. That pencilled notation which is shown on the tissue paper tracing but not on the blueprint says: "Revision okayed by L. C. Keller." The date that is on there is "9/26/"—the rest of it is "47."

Q. That is not your writing?

A. That is not my writing.

Q. Can you tell us whether this is a blueprint that is taken from the tissue, or how do these plans work; is the tissue drawing taken from the blueprint? Which way does it work, Mr. Parks?

A. The blueprint is made from the tissue paper tracing. [161]

Q. Then as far as you know, this is a blueprint from that tissue tracing, except for the pencilled notation on the top? A. That is correct.

The Court: What is that blueprint exhibit?

(Testimony of Eugene H. Parks.)

Mr. McPharlin: That blueprint is Radkovich's Exhibit I.

The Witness: Might I bring up a question at this time?

Mr. McPharlin: Well, yes; go ahead and ask it, Mr. Parks.

The Witness: I believe that there is a discrepancy on this date that is signed by Mr. Keller of September the 26th, 1947, at the top of this.

Q. (By Mr. McPharlin): How do you mean? Explain, Mr. Parks.

A. I don't believe that was "9/26/47." I think that was "8/26/47."

Q. Oh, I see.

A. Because the drawing was brought in to me with that "OK'ed" at the top, and that was 8/27 or 8/28 of '47 or thereabouts.

Q. That person who has his okay on that, is that some person in the U. S. Engineers' office or some person at Muroc, do you know?

A. I was told that Mr. Keller was the inspector on the job at Muroc, and that this revision had gone over—this drawing and the changes on it had gone over with Mr. Keller [162] and that Mr. Keller had okayed these changes.

Q. I see.

A. Now, that did not constitute acceptance by the Army; merely that the resident electrical inspector had okayed the changes on the job and this was to be submitted for the Army approval.

Q. I have here Radkovich's Exhibit D, which

(Testimony of Eugene H. Parks.)

consists of the group of back charges of Radkovich Company against Woolley. Were those prepared by you or under your supervision, Mr. Parks?

A. They were.

Q. I believe, Mr. Parks, that these consist to a large extent of electrical fixtures; isn't that correct?

A. That is correct.

Q. And then there is also a back charge which is listed here for pay roll made to electricians employed by Woolley on this job for the period from August 19 to September 8. Do you recall the circumstances as to why this pay roll was made by Radkovich Company?

A. I might ask a question there or see that, either one.

Q. Yes; you may see it.

A. As well as I can recall, Mr. Woolley was not in a position to continue to carry his pay roll any longer; and, as I recall, these men had previously or substantially all of these men had previously been in Mr. Woolley's employ. [163] In order to facilitate the prosecution of the work under the contract it was deemed advisable, due to the fact that Mr. Woolley could not carry his pay roll, that these men be put on our pay roll and paid for their work as our employees, and that the resultant charges would be considered a back charge against Mr. Woolley.

Mr. Benedict: Is that one of the items that we concede, Mr. McPharlin?

Mr. McPharlin: I do not recall.

Mr. Benedict: If you want my dates here on

(Testimony of Eugene H. Parks.)

these back charges, we will save time.

Q. (By Mr. McPharlin): What was the amount of that item?

A. \$612.72.

Mr. Benedict: We concede that, January 31, 1949.

Mr. McPharlin: I am sorry, I do not have a copy of that list that you concede.

Mr. Benedict: Here is my copy, if you want it.

Mr. McPharlin: Well, if that is the only copy you have, I won't take it from you.

Q. Mr. Parks, we have had some discussion here about pull-chain fixtures. Do you know whether or not those pull-chain fixtures were purchased or paid for by Radkovich, and are they in those back charges?

A. Yes; those pull-chain lights are in the back charges against E. B. Woolley, that is, the materials for them. In [164] other words, when I purchased the materials and shipped those materials to the job.

Q. Could you show us in that list there where those pull-chain fixtures are?

Mr. Benedict: In order to save time, would that be November 4, 1948?

Mr. McPharlin: Those were not conceded, were they, Mr. Benedict?

Mr. Benedict: No, they were not conceded. I am merely trying to shorten it, is the only reason I mentioned it.

The Witness: Are you referring to November the 4th?

(Testimony of Eugene H. Parks.)

Mr. Benedict: Yes; the back charge dated that date.

A. There is one back charge on November the 4th, page 2, for a total of \$62.52, in which two items of that are for porcelain pull chain at 50 cents each, a total of a dollar. I can't find it offhand in here, but I am sure there is in this list the balance of those 100 pull-chain receptacles.

The Court: What is the total of that item?

The Witness: Of the amount, sir?

The Court: Of the back charge on that item?

The Witness: It would be difficult, your Honor, to dig it out of here. The total back charge on that one item I just referred to for those pull-chain lights, there were only two of them.

The Court: Just for the material? [165]

The Witness: Just for the material of the porcelain pull-chain.

The Court: You said \$62.52 of material. Was that the total back charge of that item?

The Witness: Just a moment, sir. That was \$62.52, of which one dollar of that was for two porcelain pull-chain ceiling lights. There appears elsewhere in this affair here the balance of those. As I recall, those two were purchased to replace some that were either broken, damaged or otherwise removed or lost from the job.

Q. (By Mr. McPharlin): How much did each one of those pull-chain fixtures cost; can you tell us that?

A. My cost on those was 50 cents apiece.

(Testimony of Eugene H. Parks.)

The Court: Is there any credit on there for the fluorescent?

Q. (By Mr. McPharlin): Were there any deductions in there for fluorescent lighting? Of course, that consists only of back charges against Woolley, is that correct?

A. That is right; and no credit has been given for the deduction of fluorescent lighting fixtures in this back charge computation here.

Q. Do you know the cost of fluorescent fixtures?

A. No. I am in the same position that Mr. Ferguson is put in. It would depend upon the type of electrical fluorescent fixture that was to be furnished, and they could carry [166] any price from a very nominal sum to a very expensive sum.

Q. You have in the back charges, do you not, an item of back charge consisting of labor paid to Drury Electric Company?

A. That is correct.

Q. What is that back charge of payment to Drury Electric Company for?

A. In amount or for what?

Q. What is it for, and the amount, too, if you have it?

A. That back charge was compiled from a statement of charges made to us by Mr. Anderson of Drury Electric Company, after Mr. Woolley refused to perform under his contract and it became necessary for us to bring in another electrical subcontractor to replace Mr. Woolley and Mr. Woolley's personnel, and Drury Electric Company was the

(Testimony of Eugene H. Parks.)

subcontractor that performed that work and replaced Mr. Woolley during and between the periods covered by this back charge.

Q. Then Mr. Woolley, shortly thereafter, did come back on the job, is that correct?

A. That is correct.

Mr. McPharlin: You may cross examine.

Cross Examination

Q. (By Mr. Benedict): Mr. Parks, I believe you were in charge of giving Mr. Woolley notice to proceed on the job, were you not? [167]

A. No.

Q. Actually——

A. Let me correct myself there. I do not think that I was the one who actually gave Mr. Woolley the written notice to proceed. You are asking me questions two and one-half years old. If you could show me that notice to proceed that Mr. Woolley received, I could tell you whether it was my signature or not.

Q. I show you Woolley's No. 1 and ask you if that refreshes your recollection on that point?

A. I did not sign this letter and I did not mail this notice to proceed to Mr. Woolley.

Q. Do you know whose signature that is on there?

A. It would be difficult to state, but the only other person in the office other than Mr. Radkovich, myself, and Marge Collins, those are the only three that I know of who were actually signing Mr. Rad-

(Testimony of Eugene H. Parks.)

kovich's signature, that is, practically. It is not my signature. I believe that it appears to be Marge Collins'. It does not seem to be Mr. Radkovich's.

Q. Did you dictate the letter before it went out?

A. No. This letter is a standard form letter. The only thing we would change in this would be the addressee and the date. All of these letters that went out to subcontractors as notices to proceed were handled in the same manner. [168]

Q. I see. Isn't it true, Mr. Parks—

May I have Defendant Woolley's for identification—I do not recall the number. We had one we introduced this morning just for identification.

I show you Defendant Woolley's for identification No. 6 and ask you if that refreshes your recollection as to whether or not there was not a revised plan turned in to the Government for approval before the turning in of Radkovich's No. 1 and the tracing that you are testifying about?

A. I have never seen Woolley's Exhibit 6 before.

Q. Neither the copy nor the original of it? You do not ever remember it?

A. I have never seen the original or the copy before, unless this—is this a photostat of a blueprint?

Q. It is a photostat of a drawing.

A. Of a blueprint or a drawing?

Q. Well, that I could not say. I am not sure, myself. Let me show you something else. I show you another drawing, dated "8/27/47" and ask you if you have any recollection regarding that one?

(Testimony of Eugene H. Parks.)

A. No; I have never seen this drawing before.

Q. Mr. Barrington was in charge, was he not, on behalf of the Radkovich Company, of working with subcontractors on these shop drawings?

A. Only at the beginning of the job. [169]

Q. Yes. Well, that was when the shop drawings were called for, was it not, at the beginning?

A. That is when they were called for.

Q. Does it refresh your recollection at all that Mr. Woolley did not come to your office with Mr. Higuera for the purpose of going down to the Government's office to have a drawing approved, but that he came to your office after he had been handed a drawing, a revised drawing, that had been approved by the Government, and his complaint was as to the extras called for on the drawing?

A. Your question to me—phrase that again.

Mr. Benedict: Would you read, it, Mr. Reporter?

(Question read by the reporter.)

A. That is not the condition of Mr. Woolley's and Mr. Higuera's appearance at my office with this tracing.

Q. In other words, your testimony is still the same? A. My testimony is the same.

Q. All right. In other words, when they came to your office the drawing had not been approved by the Government?

A. That is correct, not the drawing referred to as Radkovich's No. K.

Q. Yes, I understand. And you say they brought this tracing in themselves? A. That is correct?

(Testimony of Eugene H. Parks.)

Q. And do you know where they got it from?

A. They came to my office from the job at Muroc. It is my understanding that the drawing was prepared on the job at Muroc, but by who it was prepared—by whom it was prepared I do not know.

Q. Do you know whether it was prepared by Mr. Barrington or not?

A. By Mr. Jim Barrington or Mr. Gene Barrington?

Q. Well, I did not know there were two. Whichever Barrington that you said was the architect in charge of these matters?

A. Mr. Barrington was not an architect; he was an architectural draftsman.

Q. Well, architectural draftsman.

A. Are you asking me my personal opinion or are you asking me for the fact?

Q. I ask you do you know; do you know whether or not he prepared it? A. No; I do not.

Q. You do not know. Did Mr. Woolley say to you who had prepared it when he brought it in?

A. I don't recall Mr. Woolley making a statement as to what person or persons had prepared this tracing.

Q. He did advise you, however, that it called for extra fixtures that he had not contemplated, did he not?

A. Mr. Woolley and I—I have already made the statement [171] to that effect. My statement stands the same. Mr. Woolley and I did discuss the additional items which were not called for or shown on

(Testimony of Eugene H. Parks.)

the original contract drawing but which this revised plan did show.

Q. And he objected to those extras on there, did he not, what he considered extras?

A. That is correct.

Q. What was the purpose in going down to the Government engineer, in view of the fact that Woolley objected to this drawing? What was the purpose of going down there?

A. Mr. Woolley was the one who brought the drawing in. It was a necessity, before Mr. Woolley could proceed any further with his work on the job, that it be necessary to have Government approval of the work that he contemplated doing. That would be in accordance with the specifications for his section of the work. He would be proceeding at his own risk if he did not obtain the approval on this drawing.

The Court: Is that in evidence, that drawing?

Mr. Benedict: This tracing is, your Honor; yes.

The Court: The tracing is.

Mr. Benedict: There is one here that I have shown the witness that he knew nothing about, that has not yet been introduced.

The Court: Which one is this that is in evidence?

Mr. Benedict: That is Woolley's No. 6 for identification. [172]

Q. The back charges on the drop lights only consisted of a \$50.00 item, isn't that true?

A. I don't recall.

(Testimony of Eugene H. Parks.)

Q. Fifty cents apiece for 100 of them?

A. My cost on it is shown by the back charge there. I found one where two of them were involved for the amount of a dollar. There would be \$49.00 shown somewhere else.

Q. I believe I can show you the rest of them. I show you invoice dated November 4, 1948, under the heading of "Equipment"—"Closet—98 only—No. 544-1 light brackets-porcelain w/pull chain at .50 each \$49.00." And they you have already testified to the other two, I believe, have you not? That made a total of?

A. \$50.00; that is correct.

Q. This back charge of November 5, 1948, that you have testified to of payment made to Drury Electric Company, that was during the approximately a week, was it, that Woolley was off of the job?

A. I don't recall the exact dates between that, but my back charges here state and show in the back charges between what days this back charge covers. Does that answer your question?

Q. Isn't it an item that occurred during the time that Woolley was off the job?

A. That is correct. [173]

Q. That is what I meant.

A. That is correct.

Q. Has Radkovich Company actually paid this company this amount?

A. I compiled this statement of charges from Drury Electric's statement to us of charges. As far

(Testimony of Eugene H. Parks.)

as I know, Drury Electric Company has been paid for this work that was performed, but I do not have access to those records and could not definitely state that they have been paid. But I believe that Radkovich's records will show whether it has or has not been paid.

Mr. Benedict: That is all.

Cross Examination

Q. (By Mr. McCall): I believe you say, Mr. Parks, you had nothing to do with the payment of Mr. Woolley on the job?

A. That is correct, except that I requested of all of the subcontractors, including Mr. Woolley, I believe—and I believe my correspondence file under the Woolley subcontract will bear this out—that I requested the subcontractors to adhere to the instructions that were given to them in their notice to proceed and subsequent instructions, to submit an estimate each month of what their charges for the month's work was; and it was my responsibility to see that those estimates got to the resident engineer in time to prepare his cost break-down [174] or estimate of the work of the general contract. That as far as any responsibility other than that, I didn't have any responsibility insofar as payments to the subcontractor or determining what the amounts to be paid to the subcontractor were.

Q. You handled the correspondence, then, did you, Mr. Parks?

A. Not all of the correspondence, because Mr.

(Testimony of Eugene H. Parks.)

Radkovich had a personal secretary who handled a lot of his personal correspondence, quite a bit of the correspondence pertaining to jobs I handled.

Q. I show you the Glens Falls, surety for Mr. Woolley, Exhibit 8 and ask you if you remember getting that letter asking for information?

A. I recall receiving a letter from your office.

Q. I show you what purports to be an acknowledgment of that letter and ask you if you signed that? A. I did.

Q. That is Glens Falls' Exhibit 9. Did you ever give to me for the Glens Falls the information requested in Exhibit 8? A. I did.

Q. And do you have a copy of that in your files?

A. I don't have a copy of that in the files. I made pencilled notes of the telephone conversation that I had with [175] you personally, and due to the fact that there was a conflict between the subcontractor and the prime contractor, most of the correspondence was being handled through or by the respective attorneys, both Mr. Benedict for Woolley and Mr. Shafer for the Radkovich Company, and before I gave the information to you over the phone I contacted Mr. Shafer who gave me the authorization to give the information directly to you. That was to expedite your—giving it to you over the phone was to expedite you, and you specifically asked for the information requested in your letter, I believe. You did not have a copy of the letter in front of you, but that you got a copy from the file and asked me the questions in the time between

(Testimony of Eugene H. Parks.)

the time I received your letter. If I am not mistaken I answered your letter right away and told you that it would take several days to compile that information, as I had to check with—for one thing, I had to check with Westinghouse Electrical Supply in order to determine what the status of that account was, how much Woolley had paid them and how much was still balance. Do you recall that conversation?

Q. With you? A. Yes, sir.

Q. No. Did you ever see me before today, Mr. Parks? A. Yes, sir.

Q. Well, when was that?

A. I am positive I saw you when we had a meeting—Mr. [176] Shafer was present—regarding this whole matter in 1948, or '49.

Q. At what time? A. Don't you remember?

The Court: Well, you will answer counsel's question.

Q. (By Mr. McCall): Who was present there then, Mr. Parks, at the time?

A. I don't recall.

Q. Was Mr. Benedict present?

A. I don't recall.

Q. Was Mr. Woolley present?

A. I don't recall.

Q. Well, will you state to the Court how you happen to remember that you had a conference with me in Mr. Shafer's office, and you can't remember who else was present?

A. I remember meeting you before, Mr. Bene-

(Testimony of Eugene H. Parks.)

dict—Mr. McCall, in regard to this matter.

Q. Is that the meeting in your attorney's office, Mr. Shafer's office, you are speaking of?

A. I don't recall whether it was in his office or whether it was in your office, but I have met you before personally in regard to this matter when other people were present, but I don't recall who they were.

Q. Nor where it was? A. No. [177]

Q. Nor when it was? A. That is correct.

Q. But this letter, Exhibit 9, states, the last two lines: "We will obtain the information and forward it to Mr. Shafer who will in turn forward it to you." And that is dated June 21, 1948. Did you ever forward the information to Mr. Shafer?

A. I don't recall whether my correspondence records would indicate that I transmitted the information that I gave to you over the phone to Mr. Shafer.

Q. Do you know the date that you gave the information to me over the phone that you mentioned?

A. It would be within a week after I wrote that letter to you in answer to your letter to me.

Q. And do you have any memorandum that indicates that you had such a telephone conversation with me?

A. I believe I have memoranda that I made at the time that I made a telephone conversation—I had a telephone conversation with you, at which time I gave you the information that you requested.

Q. Was that the first time you ever had a telephone conversation with me? A. I believe so.

(Testimony of Eugene H. Parks.)

Q. And you had never seen me before that time?

A. I don't recall whether I had seen you or met you at your office or Mr. Shafer's office.

Q. But at any rate, you never did answer this letter of June the 11th by another letter, in person, nor anyone in your office?

A. No; I can't state that I did not answer that letter, because I think that my contract files will show whether I did or did not answer that letter by another letter.

Q. And if you did answer it by another letter, then about what time would it have been sent?

A. I do not recall.

Mr. McPharlin: May we show the correspondence file to this witness?

Mr. McCall: You are asking me? I don't know what you can show the witness.

Mr. McPharlin: He is asking the witness about dates. We have a correspondence file which is in evidence.

The Court: You may hand it to the witness and he may refresh his recollection.

Mr. McCall: Why, certainly.

The Court: We will take a few minutes recess.

(Short recess.)

Q. (By Mr. McCall): Mr. Parks, did you ever find out the identity of the party you thought was me?

A. Are you referring to the telephone conversation I had [179] with you or the person that I met,

(Testimony of Eugene H. Parks.)

the statement that I referred to that I had met you previous to this time?

Q. Well, just any part of your testimony with reference to talking to me.

A. I recall having a telephone conversation with you in which and during the telephone conversation with you I gave you the information you had requested in your letter. In fact, when I called you I told you who I was and what company I was calling for and the matter that I was calling about in answer to your letter, you told me to hold on the phone just a moment. That is when I picked up a piece of paper to make a record of what I said to you. And I think the purpose of your holding me on the phone for that period of time was in order to make a transcript of what I was saying to you. That is what I believed at the time. That is what I still believe.

Q. But you did not know about that?

The Court: How important is that conversation?

Mr. McCall: Your Honor, I never saw the man before, never talked to the man before, and he has said here that he did, and I have no answer to the letter asking for the information which they were complaining about in the letter of June the 10th, 1948.

The Court: I think the important part of it is the information that you wanted, whether you re-received it or whether you did not.

Mr. McCall: That is right; which I did not get.

(Testimony of Eugene H. Parks.)

Thank [180] you, no other questions.

The Court: All right.

Q. (By Mr. McCall): But I understood you do have some explanation to the Court about the identity of the man you thought you had a conference with?

A. I stated, "I believed," or I said, "I believed that I had met you," or that I definitely had met you before.

The Court: Well, it does not make much difference. If you can answer the question, go ahead and do it, shorten this up.

A. I can't definitely state that I have met this gentleman before, although I believe that I have met him before in regard to this, but I can't prove it.

The Court: But you do state that you had a telephone conversation with him and that you gave him information over the phone; is that what you state?

The Witness: Yes, sir.

The Court: All right.

Mr. McCall: That is all, thanks.

Mr. McPharlin: I have a few questions.

Redirect Examination

Q. (By Mr. McPharlin): Mr. Parks, I call your attention to Radkovich's Exhibit F, which consists of a correspondence file, and I direct your attention in that correspondence file to a [181] letter dated July 8, 1948, addressed to "E. B. Woolley," with a carbon copy to the Glens Falls Indemnity Company; and you will also note that there is a post office re-

(Testimony of Eugene H. Parks.)

turn receipt attached to this letter, dated July 13, 1948, showing that one Angelo Woods signed this on behalf of the Glens Falls Indemnity Company as having received this letter, and ask you if you are familiar with that letter?

The Court: July the 8th, is it?

A. July the 8th, 1948. Yes; I have seen the letter and am familiar with the letter.

Mr. McPharlin: I would like to read this letter in the record, and it is in reference to the point that Mr. McCall has been bringing up. It is dated; to "E. B. Woolley;" subject is "Contract."

"Dear sir:

"Reference is made to letter dated June 10, 1948, from Mr. Radkovich directed to your attention regarding breach of your subcontract due to your failure and refusal to perform the obligations by said subcontract provided to be performed by you, and because of said nonperformance and stoppage of work on your part, it was considered that you were in default under the provisions as set forth in your subcontract. Some time after June 10, 1948, upon instructions from your legal advisors, you put your personnel back on the job [182] to continue performance under the terms and provisions of your subcontract.

"Certain conditions have again been brought to our attention that your organization is not performing on the following phases of work covered by your subcontract:

"(a) Installation of electrical fixtures.

(Testimony of Eugene H. Parks.)

“(b) Installation and hook-up of electric wall heaters.

“(c) Installation of switch plates and electrical trim.

“(d) Installation and hook-up of buzzers and door chimes for signal system.

“In view of the fact that the contractor does not consider that you have sufficient personnel on your pay roll to satisfactorily prosecute the work required on the installation of the above items, we are notifying you to put on such additional personal to adequately take care of these operations, or the contractor will be forced to put on electrical personnel of his own and back charge you for any labor costs incurred.”

And that letter contains signed return receipts from the post office department showing receipt by Woolley and the Glens Falls Indemnity Company.

Q. Also, Mr. Parks, in reference to Radkovich Exhibit F I will show you letter from the United States Engineers office [183] dated March 19, 1948, addressed to “Wm. Radkovich Company, Inc.,” and ask you to state whether or not you are familiar with that letter. A. Yes.

Q. And that was received by the Radkovich Company? A. Yes.

Q. In the mail? A. That is correct.

Mr. McPharlin: This is very short. I would like to read this. It is from the United States Engineers to Radkovich Company, Inc.:

(Testimony of Eugene H. Parks.)

“Gentlemen:

“Reference is made to our letter dated 16 March 1948, relative to the approval of materials. Following is a supplemental list of materials which your office has not submitted for approval:

“(a) Light fixtures.

“(b) Door chimes.

“It is requested that you notify this office without delay what you propose to furnish under each item listed above.”

It is signed “W. J. Leen, Chief, Operations Division.”

Q. Mr. Parks, on this date, March 19, 1948, had Mr. Woolley furnished you with a list of light fixtures and door chimes?

A. To the best of my knowledge, to that date he had [184] not furnished the list to us.

Q. I will show you in this same exhibit a letter from the War Department Corps of Engineers, dated April 5, 1948, addressed to “Wm. Radkovich Company, Inc.,” and ask if that was received in the office of the Radkovich Company?

A. That is correct.

Mr. McPharlin: I would like to read this very brief letter. It is addressed to Wm. Radkovich Company from the War Department Corps of Engineers. It states: “Gentlemen:”——

Mr. McCall: May it please the Court, I would object to that as hearsay insofar as my client Glens Falls is concerned. There is no foundation laid for it and I do not know what it is. I have no copy of it.

(Testimony of Eugene H. Parks.)

The Court: All right; show it to counsel.

Mr. McCall: I have never seen it. (Examining document.) Since it does not affect my client any, I have nothing further to say.

Mr. McPharlin: This letter addressed to "Wm. Radkovich Company, Inc., states:

"Gentlemen:

"This office has been advised by higher authority that the contractor shall furnish and install all light bulbs that are required under the above subject contract, 'Temporary Family Quarters.'" [185]

It is signed "R. E. Fergason Resident Engineer."

Q. I will show you another letter from Department of the Army Corps of Engineers, dated May 18, 1948, and ask you if that letter was received in the mail by the Wm. Radkovich Company?

A. Yes; it was.

Mr. McPharlin: This letter from the Department of the Army Corps of Engineers, addressed to "Wm. Radkovich Company, Inc., states:

"Gentlemen:

"Your proposed schedule of electrical fixtures to be installed in the Temporary Family Quarters being constructed at Muroc Air Force Base, Muroc, California, has not been received by this office.

"Unless your proposed schedule of electrical fixtures is received on or before 1 June 1948, the Contracting Officer (as provided for by paragraph 15-03 c of the contract specifications) will select a schedule of electrical fixtures. Paragraph 15-03 c reads as follows:

(Testimony of Eugene H. Parks.)

“ ‘If the contractor fails to submit for approval within the specified time, a list of materials, fixtures and equipment in accordance with the preceding paragraph, the contracting officer will select a complete line of materials, fixtures and equipment. [186] The selection made by the contracting officer shall be final and binding and the items shall be furnished by the contractor without change in contract price or time of completion.’ ”

“For the District Engineer:

Very truly yours,

/s/ W. J. LEEN,

Chief, Operations Division.”

Q. On the date of this letter, May 18, 1948, had Woolley furnished the Radkovich Company with the list of electrical fixtures?

A. To the best of my knowledge, to that date he had not furnished a list of electrical fixtures.

Mr. McPharlin: No further questions.

Mr. McCall: May I ask one more question, please?

Recross Examination

Q. (By Mr. McCall): Mr. Parks, you stated a while ago that you might have in your files a letter in reply to the one that is in evidence here as the Glens Falls' Exhibit No. 8, is that right?

A. Would you read me what I stated in regard to that?

(Testimony of Eugene H. Parks.)

Q. Well, to save time, you did state that you had data from which you gave me the information on the telephone in reply to that letter, is that correct?

A. That is correct. [187]

Q. Now, if we do not close this afternoon could you bring that data, any letters in connection with replying to that letter, back to court tomorrow morning?

A. Mr. McCall, you have put me in this position: In that I personally do not have any of the records that I kept for the Radkovich Company. All of the records which I made during my employ with the Radkovich Company were retained and kept by the company. When I left their employ I do know that all of the records that I kept were there.

Q. Then you can find it, I presume?

A. Now, if those records have been kept in the order that I had them, I would say yes; but I can't state whether they have kept those records or not.

Q. Will you make a search for any data in reply to that letter, Exhibit 8? A. Will I?

Q. And try to bring it here to court tomorrow morning?

A. How would I make that search, sir?

The Court: Can't you ask counsel to produce it if he can find it?

Mr. McPharlin: Mr. McCall, if you want us to conduct a search through Mr. Radkovich's records, why, we can do so.

Mr. McCall: Well, I certainly would appreciate it, because I would like to have some evidence to

(Testimony of Eugene H. Parks.)

back up the witness's testimony. [188]

Mr. McPharlin: Yes. All right, then, this evening I will have a check made to see if we can locate these records that Mr. Parks has referred to and let you know, and bring them in if we can find them.

Mr. McCall: Thank you.

The Court: Can you recollect on what kind of paper you put these notes? Were they on an envelope?

The Witness: They were on paper.

The Court: So as to assist counsel in trying to find them.

The Witness: Do you want me to give him that information, sir?

The Court: I say, can you?

The Witness: Yes, sir. Nearly all of my notes were made on the same type paper, the same type you have in that pad.

The Court: White paper or yellow paper?

The Witness: No; most of it was on yellow paper, yellow pads. Would you hold up your paper, sir?

Mr. McPharlin: Yes; I know.

The Court: At any rate, you are going to give counsel all the assistance you can on that. Anything further?

Q. (By Mr. McCall): Could you state to the Court, then, Mr. Parks, from where you got the information which you put on your notes before you gave it to me on the telephone?

(Testimony of Eugene H. Parks.)

A. I believe so. One of the organizations that I [189] contacted to obtain the information was—I believe it is the Westinghouse Electric Supply. I contacted them to find out what the exact amount was that they claimed was due them under the Miller Act. I contacted them also to find out exactly how much Mr. Woolley had paid to them for materials which he had bought for this job. I contacted our files from Mr. Flobeck's records, I believe to find out how much he had been paid to date. I contacted our correspondence file, which you have seen submitted here, to refer to other questions or to answer other questions that you asked.

Q. Then the source of the information which you put on your notes and gave to me on the telephone, as you testified, is still available, then, if the notes are destroyed?

A. That question I can't answer, Mr. Benedict (Mr. McCall) because I don't know whether those records are still available. I am sure that for one part of it, the records would indicate that the information that I got from the Westinghouse Electric Supply in regard to that question are. I think our records——

Mr. McCall: I understand from your counsel he will bring in everything tomorrow morning that may be found in answer to that letter which is in evidence as Exhibit 8. There are no further questions.

The Court: Anything further of this witness?

Mr. McPharlin: Nothing further. [190]

Mr. McCall: Nothing further.

The Court: You may step down.

Mr. McPharlin: Radkovich and his sureties will rest, your Honor, with one exception. There was another witness that would have been very brief, that I had on call from San Diego, your Honor. I understand he was a contractor who had some difficulties and he did not make it. If he does arrive here later, while this is still in progress, I would like the opportunity to call him out of order. It will be very brief.

The Court: Very well.

Mr. Benedict: Woolley is ready to proceed, then, if the Court please. Will you take the stand, Mr. Woolley?

Mr. McPharlin, I have some letters which you have examined which I would like to introduce—there is a group of them as Mr. Woolley's next exhibit.

EDWIN B. WOOLLEY

a defendant, cross-defendant and cross-complainant, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Edwin Woolley.

The Clerk: Is your middle initial B?

The Witness: Yes, sir.

The Clerk: Are you offering them, Mr. Benedict?

Mr. Benedict: I am offering this in as one exhibit, a [191] group of letters fastened together.

The Clerk: Are these admitted, your Honor?

(Testimony of Edwin B. Woolley.)

The Court: They may be received.

The Clerk: Defendant Woolley's Exhibit 10 into evidence.

Mr. Benedict: At this time, too, if the court please, I would like to dispose of one other preliminary matter which I discussed with Mr. McPharlin. Through inadvertence our cross-claim in this matter, on page 7, contains two erroneous figures. It does not change the prayer of our complaint in any way, and I would like permission at this time to amend the two figures on page 7 by interlineation.

The Court: What are those?

Mr. Benedict: On line 28, change the figure "\$82,875.53" to "\$99,052.11.

The Court: Change the figure of what?

Mr. Benedict: "\$82,875.53." That is on line 28.

The Court: Yes. To what?

Mr. Benedict: "\$99,052.11." And on line 30, the figure "\$37,425.26" to "\$53,601.84."

I also have one correction in a date on page 8 and page 9. On page 8, line 29, I would like permission to change the date "September 1, 1947" to "August 28, 1947."

On page 9, line 1, the date "September 1, 1947" to "August 28." [192]

The Court: I think it would be better if you would file an amendment showing the changes.

Mr. Benedict: Would your Honor prefer that I rewrite it or simply rewrite the paragraphs involved?

(Testimony of Edwin B. Woolley.)

The Court: No; you can write a memo showing the changes you desire to make.

Mr. Benedict: Yes. Well, I will do that, then, your Honor. That is all of them, simply the dates and those two figures.

The Court: So that it can become a part of the pleadings and part of the files, amend in the particulars that you have called to the court's attention.

Mr. Benedict: Yes; I understand. I will file that in the morning, then, if that is agreeable.

Mr. McPharlin: That is satisfactory with us.

Direct Examination

Q. (By Mr. Benedict): Mr. Woolley, when did you first meet Mr. Radkovich?

A. When I was wiring his home sometime in July, 1947.

Mr. McCall: Mr. Woolley, I am unable to hear you over here.

Mr. Benedict: Will you speak up a little louder, please?

A. Around July, 1947.

Q. Did you have a discussion with Mr. Radkovich relative to your taking a subcontract on the Muroc job for electric [193] work?

A. Yes. He asked me to come over——

Q. No; I have not asked you for the discussion, please. In connection with that discussion did he give you anything upon which to figure out your bid?

(Testimony of Edwin B. Woolley.)

A. Yes; he gave me a plan and set of specifications.

Q. I show you Woolley's No. 5 in evidence and ask you whether or not that is the drawing Radkovich gave you at that time?

A. That is the drawing.

Q. Did you base your price for the electrical work on this drawing? A. That is right.

Q. Did he also give you any specifications?

A. Yes; he gave me a set of specifications.

Mr. McCall: Louder, please, Mr. Woolley.

Mr. Benedict: Speak up louder, Mr. Woolley, if you will.

The Witness: All right.

Q. (By Mr. Benedict): I show you Radkovich's No. B in evidence and ask you if he gave you a set of specifications that are a duplicate of this exhibit?

A. Yes; he did, except for this first part here. The War Department Contract was not on it.

Q. He did not give you, then, a copy of his prime contract with the Government? [194]

A. No, sir.

Q. Did you ever have a copy of that contract before you entered into the subcontract with Radkovich? A. No, sir.

Q. Did you ever see a copy? Did you ever read a copy of it? A. No, sir.

Q. In reference to fixtures on the job, Mr. Woolley, will you state whether or not there are any type numbers for fixtures indicated on Woolley's

(Testimony of Edwin B. Woolley.)

No. 5? A. No, sir.

Q. That you were given at that time?

A. No, sir.

Q. In arriving at your price of your subcontract did you take into account the price of any fixtures?

Mr. McPharlin: I will object, your Honor, as incompetent, irrelevant and immaterial. He has a written contract, plans and specifications.

The Court: I believe that is correct.

Q. (By Mr. Benedict): Thereafter you entered into the subcontract that is before the court, did you not, with the Radkovich Company?

A. Yes, sir.

Q. Thereafter, will you state whether or not you received notice to proceed on your work. [195]

A. I did.

Q. After you received that written notice to proceed, did you report to anyone on the job site?

A. Yes; I did, to Ted Thompson, who was his superintendent.

Q. What instructions did you receive, if any, from Ted Thompson as to when you should commence operations on the job?

A. He said they were going to commence right away, and to ship my materials there and be ready to go around the 15th of the month.

Q. What month was that?

A. August, 1947.

Q. Will you state whether or not you were at the job site on August 15, 1948?

(Testimony of Edwin B. Woolley.)

A. I was there personally; yes, sir.

Mr. McPharlin: 1948, Mr. Benedict?

Mr. Benedict: '47. Excuse me.

Q. When, if at any time, did you first have a crew of men at the job site?

A. I had a crew of men ready to work on August the 28th.

Q. Do you have your payroll records with you?

A. I do.

Q. Can you tell us from examining those payroll records when you commenced operations under your subcontract? [196]

A. It was about October the 4th, I think.

Q. And why didn't you start before that date?

A. Well, the Radkovich Company couldn't get their aggregate passed and they didn't have their forms set up.

Q. From August 28, 1947 until about October 4, 1947 would you state whether or not you had a crew of men on the job? A. I did.

Q. Will you state whether or not during that period of time they were able to do any work?

A. No. They prefabbed a little pipe, but then it come up to these changes and the routing of the pipe, and so we had to stop prefabbing pipe because we didn't know, until the army approved, what the changes were going to be, whether they were going to approve the changes or not.

Q. Do you know how many days that they prefabricated, approximately?

A. No; I can't say. It wasn't—no; I can't say.

(Testimony of Edwin B. Woolley.)

Q. Do you have any estimate of how many days it might have been?

A. It could not have been over a week, because as soon as I found out there had to be changes I went right back up there and just told them to stop until I got it straightened out.

Q. From your payroll records can you state what your [197] payroll was from August 28th to October 1, 1947? A. \$1,149.22.

Q. How much of that period would you estimate, or, rather, how much of that amount would you estimate included productive labor in prefabricating? A. At the most, \$200.

Q. While you have your payroll records before you, Mr. Woolley, will you also examine them and tell the court the amount of your payroll from April 15, 1948 to the date that you completed your subcontract? A. It is \$15,027.36.

Q. And up to what date does that amount cover?

A. Up to October 6, 1948.

Q. Was that the date that you completed your subcontract?

A. Yes; that was the date I completed.

Q. After you arrived at the job site, will you state whether or not you were supplied a shop drawing or a work drawing by anyone?

A. Yes. I took the original drawings that I had to the architect on the job—who was not Jim Barrington; it was Bob somebody worked out of Barrington's office; I don't remember his name—and there was some location changes and it meant mov-

(Testimony of Edwin B. Woolley.)

ing the heaters because the cans were too large to put underneath the windows, and it meant moving some [198] pipes that could not be put in because the buildings were poured in two separate units and then there was a Gunitite partition poured between them, and it would be too hard to find your pipes after they were poured. So we made them service objections, and he said he couldn't change it without Keller's okay, and we got Keller, who was the chief electrical inspector, to give his okay to them, and we went and got this drawing up. He drew it and I approved it.

Q. You are now referring to Woolley's Exhibit 6 for identification? A. That is right.

Mr. Benedict: I would like, then, if the court please, to offer as Woolley's next exhibit his No. 6 for identification.

The Court: It may be received.

The Clerk: No. 6 for identification admitted into evidence as Woolley's Exhibit No. 6.

Q. (By Mr. Benedict): Did you commence wiring under the drawing that I have just shown you?

A. No, sir. It had to go into the army engineers to be approved. It was sent to Radkovich's office.

Q. When was the next thing that you heard in reference as to whether or not the drawing had been approved?

A. Well, actually, I didn't hear whether it had been approved or not. They sent me back another drawing and it was approved, but it had a lot of extra things on it. [199]

(Testimony of Edwin B. Woolley.)

Q. I show you, then, Radkovich's No. I in evidence and ask you if that is a copy of the approved drawing that you next received?

A. No, sir; that is not a copy of the approved drawing. That is a copy that evidently they sent in. That is the drawing, but it is not "approved" on that.

Q. It does not have the notation "approved" on it?

A. No, sir.

Q. I show you another drawing that bears the stamp "approved 26 Sept. 1947 for the District Engineer F. R. Cline," and ask you whether or not that was the drawing that was next given you?

A. That is right. This is the drawing that was next given me. This is a duplicate drawing, except it is stamped "okay."

Q. Do you recall about the date that this last mentioned drawing was handed you?

A. No. It was around the end of the month, I would say around the 30th.

Q. Of September?

A. Of September; that is right.

Q. At the time it was given to you do you remember whether or not it had the stamp of approval on it?

A. It did.

Q. That you have just testified to? [200]

A. Yes, sir.

Mr. Benedict: I would like to introduce this into evidence, if the court please, as Defendant Woolley's next in order.

The Clerk: Admitted, your Honor?

(Testimony of Edwin B. Woolley.)

The Court: It may be received.

The Clerk: That will be Defendant Woolley's Exhibit 11 into evidence.

Mr. McPharlin: Mr. Benedict, when did he state that was received.

Mr. Benedict: Towards the end of the month.

Mr. McPharlin: What month?

Mr. Benedict: September, 1947.

Q. When you received this drawing, Mr. Woolley, did you notice anything about it that it contained items that were not on the previous drawing that you had? A. Absolutely.

Q. What items were those?

A. Well, the addition of a telephone circuit, the addition of a three-way switch for the entry hall lights, the addition of two push buttons and chime circuit, and the addition of a pull-chain light in the living room closet, and the addition of this written down here at the bottom, "Chimes in Entry, Transformer in Distribution Panel", and a "note:" here, "Electrical Fixtures in accordance with [201] list to be submitted for approval."

Q. What, if anything, did you do after you were handed this drawing?

A. Well, I went right to Radkovich's office and talked to Parks and to Radkovich.

Q. And about when was that conversation?

A. About the 1st of October.

Q. Anyone else present besides the three of you?

A. I believe Higuera was with me at the time.

Q. Will you give us the substance of the con-

(Testimony of Edwin B. Woolley.)

versation that occurred relative to this revised drawing?

A. Well, I told Radkovich that I didn't approve of it and there was extras on it that I had never seen or never figured, and wanted to know what he was going to do about it. And he said, "I don't know. Parks, what are we going to do about it?" So Parks says: "I don't know. The other plan was approved. The Army okayed it. I don't know why we have to put this other stuff in."

So we went down to the Army Engineers' office to find out why they had added it. And, of course, I—

Q. Who went down to the Army Engineers?

A. I believe just Parks and myself. I don't believe Higuera went with us.

Q. That was the same day?

A. That was the same day—it was the next morning. We [202] couldn't get to see the man down there. We called down there and made the appointment for the next morning.

Q. Do you know who you saw down there at the Army Engineers' office?

A. Well, we seen two or three of them. McCumber was the man that done the most and the architect down there.

Q. In your conversation to Radkovich and Parks did you point out the items that you claimed to be extras? A. I did.

Q. Will you state whether or not those are the same items that you have just testified to?

(Testimony of Edwin B. Woolley.)

A. They are.

Q. When you arrived at the Engineers' office did you have another discussion about these extras?

A. Yes; I did with Parks and with McCumber.

Q. What was said about them?

A. Well, I don't recall the exact conversation. McCumber said he knew nothing about the telephone; that was something that he had never seen there before, although they had approved it. And he said he didn't know who made the changes, but it was an approved copy and that was the one we would have to wire to. And I told him I was not going to do it because I had not figured the job that way. And he said, "Well, that is a matter that you and the prime contractor have to get together on. We don't recognize you at all as being in this office." [203]

Q. Did you have a further discussion then after that with Radkovich as to what was to be done about these so-called extras?

A. Well, in the same day but later in the week, why, we had to get going on it, so I went over to see him. And he said the army was going to take the job away from him if he didn't get started here. It had already been delayed for quite a while; for me to go ahead and wire to this plan and he would take care of the extras, he would pay me for them.

The Court: Who said that?

The Witness: Wm. Radkovich.

Q. (By Mr. Benedict): Did you thereupon pro-

(Testimony of Edwin B. Woolley.)

ceed with the performance of your subcontract?

A. I did.

Q. After you had started on the performance of your subcontract did you have any further conversations with Radkovich relative to your furnishing electrical fixtures?

A. Not until quite late in the contract. They sent me a letter asking for a brochure on the fixtures and I called Parks back and told him that I was not supposed to furnish the fixtures. And he said I had better come over and get together with Bill and him, and I did that, and that was quite an argument we had that day and wound up with Radkovich saying: "It is in the specifications. You are stuck with it and you are going to furnish them." Of course, I walked out pretty [204] hot, and I guess everybody was pretty hot that day. However, I went back again. Well, it turned out the same way, though. I mean we couldn't agree on the fixtures, and so he felt that I was supposed to supply them, and I felt that I was not; so it was just left at that until these letters came into effect.

Q. Did you actually install the fixtures?

A. I did.

Q. Do you have a statement from which you can testify, Mr. Woolley, as to the items which you claim constitute the extras for which you are suing here?

A. I do.

Q. Do you have an item down there for the cost of installing the fixtures?

A. I do.

(Testimony of Edwin B. Woolley.)

Q. And what is that item? A. \$4,800.

Q. Does that represent the actual cost to you in labor in installing the fixtures?

A. No; that is with the write-up.

Q. And how much would that be?

A. Let's see.

Q. Do you mean by that overhead and profit?

A. That is right. It is 1200 man hours at \$4.00 an hour. My actual cost, the actual wages to the men, was \$2.40, but then it is not exactly \$2.40, either, because you have 2.7 and 1 per cent and 2.18 per hundred. I never broke it [205] down that way. That is a legitimate write-up for profit and overhead.

Q. What item of overhead did you use on these extras, what percentage?

A. I think it was 15 per cent.

Q. What percentage of profit?

A. I believe 10 per cent.

Q. Now, Radkovich paid for the fixtures and you installed them; that is correct, is it not?

A. That is right, with an understanding that he was going to pay me for installing them.

Q. Did you have any additional understanding with him other than what you have testified to?

A. Well, later on, after he agreed to—

Q. When did you have a conversation with him in reference to his paying for your installing the fixtures, do you remember?

A. I don't remember the exact month, but it was after these letters come from the army saying

(Testimony of Edwin B. Woolley.)

they had to get in something to the army on what fixtures they were going to supply. He asked me if I would work that up for him, even though I was not going to pay for them. He said we would argue that out at the end of the contract who was going to pay for them. And I did work with the army engineers. They didn't have any plans that showed any fixtures that went in these [206] buildings. They never could find any, so they finally worked out something. They gave me, I believe it was two choices, and I contacted both companies and give a figure to Wm. Radkovich and he submitted it to the army.

Q. In Woolley's Exhibit No. 10 I show you a letter written by me to Wm. Radkovich Company giving a list of fixtures and light bulbs, and ask you if that was sent out under your authority?

A. It was.

The Court: Do you want to continue this evening?

Mr. Benedict: Well, I rather doubt it. I am pretty reasonably certain we ought to be able to finish by noon tomorrow, and it would be a help to me personally if we could adjourn now. I have got some things at the office.

Don't you think we can finish tomorrow?

Mr. McCall: I would think so, easily, by noon.

The Court: Very well.

Mr. McCall: Before we adjourn, if it please the court, I would like to ask opposing counsel if they will produce and bring to the court in the

morning all of the vouchers that they received from Mr. Woolley in connection with his payments on the estimates, the amounts which he claimed from month to month.

Mr. McPharlin: To save time, do you have copies? Does Mr. Woolley have copies? [207]

Mr. McCall: Yes; I have copies or one copy, but I would rather have the copy that is identified as the one received by Mr. Radkovich.

Mr. McPharlin: Oh, I don't think we have any dispute over that, although I have not attempted to go through Radkovich's voluminous files to select those out, Mr. McCall. You are going to want me to stay up all night.

Mr. McCall: If it is all right for me to use these, I will be glad to show them to counsel right now.

Mr. McPharlin: All right. Let us get together right after court adjourns. Maybe we can check over this.

Mr. McCall: The same ones I used on the deposition.

Mr. McPharlin: All right; let us do that.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m. of the following day, Friday, May 19, 1950.) [208]

Los Angeles, California,
Friday, May 19, 1950, 10:00 a.m.

(Case called by the clerk.)

The Court: You may proceed.

Mr. Benedict: Mr. Woolley, will you resume the stand, please?

E. B. WOOLLEY

Direct Examination—(Resumed)

By Mr. Benedict: At this time, if the court please, I would like to offer into evidence as Woolley's next exhibit in order his payroll summary sheets from which he testified yesterday, as one exhibit.

The Clerk: Admitted, your Honor?

The Court: What payroll was this?

Mr. Benedict: This was his payroll on the job in question.

The Court: On the entire job?

Mr. Benedict: Yes; that is right, your Honor.

The Court: It may be received.

The Clerk: That will be Mr. E. B. Woolley's Exhibit No. 12 into evidence.

The Court: Are there any portions of that payroll sheet that are involved here?

Mr. Benedict: It probably covers more than is really [211] involved, I think, your Honor. It is his complete payroll, as far as that is concerned. Of course, all we are really concerned with is the payroll up to the time he started and the payroll from

(Testimony of E. B. Woolley.)

April 15th, but I was putting in complete the record in any event.

The Court: I think you should mark those particular periods so that I can refer to those more readily. Otherwise the balance of it is on a contractual basis, is it not?

Mr. Benedict: Yes; that is right, your Honor, it is.

Q. Mr. Woolley, will you take Woolley's No. 12, and by dipping this pencil will you mark the sheets from which you gave the figures of your payroll up to the time you commenced?

A. Yes, sir.

Q. Perhaps the designation "W" up in the left-hand corner. That is the first page, the second page. First, it is just the first page and the second page for the payroll up to the time you started?

A. That is right.

Q. Now, will you mark the pages that cover the payroll from April 15 to the date of completion? That is pages 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and the witness has indicated with a "W" in the upper left-hand corner those particular sheets. A. Yes. [212]

Mr. Benedict: Mr. McPharlin, may it be stipulated now that the defendant Woolley's No. 6, this revised electrical plan, was part of the record that was obtained from the United States Engineers' office?

Mr. McPharlin: We have no information on that, Mr. Benedict, so I have no knowledge that I

(Testimony of E. B. Woolley.)

can stipulate by. We have the testimony, I believe, of the witness. I might say I have no contrary testimony, but I do not feel I can very well stipulate.

Mr. Benedict: I can state this: That this was one of the sheets—we did not introduce the sheet that Mr. Woolley stated was given him—we introduced this photostatic copy which came as part of the material furnished us from the United States Engineers' office pursuant to a request that we all made, and this is one that he sent us.

Mr. McPharlin: You want me to stipulate that this is a true photostatic copy of the original?

Mr. Benedict: That came from their office, was part of their files, part of the United States Engineers' files.

Mr. McPharlin: Oh, I will be willing to stipulate that this is a true photostatic copy of the original of which this purports to be a copy.

Mr. Benedict: Well, no; that does not quite reach the problem. What I wanted was a stipulation that this was supplied us by the United States Engineers' office from their [213] files.

Mr. McPharlin: Was it?

Mr. Benedict: It was, yes.

Mr. McPharlin: I will so stipulate, that the United States Engineers furnished you that copy from their files.

Mr. Benedict: All right.

Q. Mr. Woolley, do you recall an occasion when the matter of deleting the water heaters from the

(Testimony of E. B. Woolley.)

price of the subcontract came up?

A. Yes. I received a letter from them stating that they did delete the water heaters. That was the first I heard of it.

Q. Who was that letter from?

A. Well, the Radkovich Company.

Mr. Benedict: Mr. McPharlin, did you introduce that letter into evidence about the deletion of the water heaters?

Q. What did you do after you received this letter about the water heaters?

A. Well, I called the Radkovich Company on the phone. I don't remember whether I talked to Parks or to Bill Radkovich, but I told them that since I had figured the contract, why, I would give all the material to one supplier, practically, and they would give me a lot better price on the heater; and if they were going to contact them, I would like them to contact them at the price of \$55.10 a heater. [214]

Q. Did you have a commitment from another supplier for heaters at that latter price?

A. I did.

The Court: Are these heaters in controversy?

Mr. Benedict: Well, yes; they are in this respect, your Honor: That is the first item, I suppose, of dispute between the parties, that the contract price was \$80,000. Radkovich claims that \$6,100 should be deleted from the price because of the deletion of the water heaters by the Government furnishing them. We claim that the amount by

(Testimony of E. B. Woolley.)

which the contract should be reduced is a smaller amount than that, to-wit, the actual cost that Woolley claims that he could supply the water heaters; so that is about a \$700 item in that respect.

The Court: Yes.

Q. (By Mr. Benedict): What did the party at Radkovich Company that you talked to regarding the heaters say in response to your statement?

A. I believe I was talking to Parks, and he said he couldn't make any deal like that over the phone; I had to come over and see Radkovich. And I went over and I seen Radkovich, and he maintained that I told him at the start of the contract that the heaters would cost me \$61.00, and that is what he had told the army, and that is why they reduced it in that amount, and it was all done and final, and there was nothing I could do about it.

Q. Did you ever sign any instrument agreeing to a reduction to the price that Radkovich was claiming? A. No, sir.

Q. In any event you did not install the heaters, did you?

A. No, sir. Mr. Benedict, I hooked the heaters up. I did not install them. They were placed on the job and I hooked them up.

Q. Oh, I see.

The Court: Is that involved here?

Mr. Benedict: No; that is not involved, your Honor, that part.

Q. I show you Radkovich's D in evidence, being a list of back charges, and call your attention to

(Testimony of E. B. Woolley.)

the back charge dated November 5, 1948. Could you explain what that item is for?

A. That is 100 2-light ceiling fixtures.

Q. And that item, with tax, amounts to \$189.62, is that right? A. That is right.

Q. Do you know what fixture that refers to in reference to the wiring of the house?

A. Without looking at the plan, I think it is the kitchen light.

Q. In any event is it a fixture?

A. It is a fixture. [216]

Q. And that is one of the items that is not conceded, is it not? A. That is right.

Q. I show you another back charge dated November 5, 1948, reading "200—Wire Lamp Guards" total of \$65.60 including tax. What is that item?

A. Well, those wire guards went on the lamps in the entry hall.

Q. Are wire guards a part of the fixture?

A. Yes, sir.

Q. I show you the next one bearing the same date: "Freight on materials purchased and delivered to Muroc jobsite by Wm. Radkovich Co., Inc. 107 miles one way," etc., \$107.00. Do you know what that item refers to?

A. Well, I guess it is the fixtures going up to the job. That was quite a surprise to me because my truck was going back and forth, too.

Q. Will you speak louder, Mr. Woolley?

A. I say, that was quite a surprise to me because my truck went back and forth to the job, too,

(Testimony of E. B. Woolley.)

and I hauled some stuff for the Radkovich Company, and I had no idea they were going to charge me for this.

Q. Did anyone from Radkovich Company tell you they were going to charge you freight on anything they sent up there? A. No, sir. [217]

The Court: What did you say about those wire guards? I did not quite understand that. They were charged to you?

The Witness: Yes, sir.

The Court: And you say they were part of the fixtures?

The Witness: They were a part of the fixtures; yes, sir.

The Court: What are wire guards?

The Witness: Well, it is a sort of a cover.

The Court: An arrangement they made?

The Witness: It is just two porcelain sockets that screw to the wall, and then you put these lamp guards over to keep them from breaking.

The Court: They are wire guards; they are frames?

The Witness: Yes; they are a framework of wire that clamps right around the lamp globe itself.

The Court: They were a part of the fixtures, specified in the fixtures?

The Witness: Yes; they were specified as such.

The Court: In your specifications?

The Witness: Oh, no; not in the specifications. I don't know who devised it. There was nothing ever

(Testimony of E. B. Woolley.)

found to say what the fixtures should be.

Q. (By Mr. Benedict): You would have to have a fixture before you could use a wire guard, would you not?

A. Oh, yes, sir. I don't know who made up the the fixture. It was somebody made the fixture up and the Radkovich Company [218] bought it, but I don't know who made it up. It probably was at the suggestion of the army engineer.

Q. Was there anything suggested on any of the plans or in the specifications that have been introduced into evidence that called for a wire guard? A. No, sir.

Q. I show you another back charge dated the same date: "Work at Muroc performed by Drury Electric Co.," a total of \$166.66 including overhead of 10 per cent. Do you know what that refers to?

A. Well, I believe that Radkovich Company hired Drury Electric Company at the time I was off the job, but they didn't do any work on the job. My material was locked the full time I was off the job and there was nothing done on the job at all. My men never left the job.

Q. Did you know that when you came back on the job, that there had been nothing further done from the time you pulled off until the time you returned? A. That is right.

Q. I show you another back charge dated November 5, 1948, which is apparently a combination of the other. It speaks of "Subsistence 4 days @ \$7.00" and "Drury Electric Company", and that

(Testimony of E. B. Woolley.)

is a total of \$333.11. Does that refer to the subsistence of the men on the Drury Electric Company payroll? A. That is right. [219]

Q. Here is another back charge of November 5, 1948 for "2—1 light brackets for bathrooms (complete)", with tax, in the sum of \$4.30. What are light brackets?

A. They are brackets that go on a wall.

Q. Are they designated as "fixtures"; is that the common term for them?

A. They are fixtures; yes, sir.

Q. Another back charge of November 5, 1948 for "Halls & Bedrooms—25—glass shades"; "Front and rear porches V. P. globes".

A. That is vapor-proof.

Q. Vapor-proof globes. Those are electric light globes, are they? A. No; they are fixtures.

Q. And "kitchen ceiling 5-globes." Can you state whether all those items refer to fixtures or not?

A. They are all fixtures; that is right.

Q. Another back charge dated the same date for "25-glass shades" and "10-3x5 V.P. globes", etc., total of \$31.26. Can you state whether or not those all refer to fixtures?

A. They all are fixtures.

Q. I show you back charge dated November 4, 1948, consisting of several items, and also the page 2 of the same date, which is for a total of \$62.52. Are all those fixture [220] items?

A. They are all fixture items.

(Testimony of E. B. Woolley.)

Q. Another one dated November 5, 1948 for \$6.39. Can you state whether or not those are fixture items? A. They are all fixture items.

Q. Another one the same date for \$7.65. Is that a fixture item? A. That is.

The Court: Are you conceding these items or any of them as you go along?

Mr. Benedict: I have not come to those. As we go along I was going to mention it.

The Court: These are not conceded, is that it?

Mr. Benedict: That is right; those are not conceded. I will so state; in fact, we will initial the ones we concede when he comes to them.

Q. I show you another one dated November 4, 1948, consisting of several items for a total of \$3,124, and ask you whether or not those all relate to fixtures? A. They are all fixtures.

Q. I show you another one dated October 20, 1948, for \$45.98. That is one that you concede, is it not? A. That is right.

Mr. Benedict: With the court's permission, I will just write "okay" in the lower right-hand corner, which will make [221] it easy to determine that.

Q. Here is another one, dated October 19, 1948, for \$192.22. That is also conceded, is it not?

A. That is right.

Q. I will okay that one. Another one dated October 19, 1948, for \$97.70. That is also conceded?

A. That is right.

Q. I show you one dated October 20, 1948, in

(Testimony of E. B. Woolley.)

the total sum of \$208.30. Are all those items conceded?

A. Well, not these push buttons. That has to do with the chimes.

Q. And that is an item of "600 Edwards push buttons" at \$31.60?

A. I believe it is an item of 200.

A. Oh, is it 200? But the amount is \$31.60?

A. That is right.

Mr. Benedict: I will simply just put down "okay less 31.60 push buttons."

I show you one dated November 1, 1948, for \$51.22. Is that one conceded? What does that relate to, anyway?

A. No. That has to do with the fixtures hooking up those entry hall fixtures.

Q. That relates to a fixture item, then?

A. That is right.

Q. I show you one dated October 19, 1948, for \$176.78. [222]

A. I do not concede that.

Q. Does that relate to fixtures, too?

A. That is the globes for the fixtures.

Q. That is the globes, all right. Another one dated October 19, 1948, for \$182.08. Does that relate to fixture items, too? I am sorry, that is simply a continuation of the other one, isn't it?

A. That is right.

Q. That is page 2 of it; so the total item, then, is \$182.08. Then one dated November 1, 1948, for \$101.38. Does that relate to fixture items?

(Testimony of E. B. Woolley.)

A. No; it don't. I concede that.

Q. You concede that one. Another one dated October 19, 1948, for \$160.68. That one is also conceded, is it not? A. That is right.

Q. I show you another one dated October 19, 1948, for \$826.15; and that one is likewise conceded, is it not? A. That is right.

Q. One dated October 20, 1948, for \$43.91. What does that relate to?

A. That is fixture material.

Q. So that one is not conceded?

A. No.

Q. The next one is January 31, 1949, for \$376.69, and that relates to chimes. [223]

A. I do not concede that.

Q. The next one is January 31, 1949, consisting of three pages, a total of \$612.72, and you concede that? A. That is right.

Q. The last one does not seem to have a date. It is simply "15% Overhead on \$6,867.37 back charges \$1,030.11." Do you know what that item relates to? Can you tell us that?

A. Well, that is on the fixtures, and I sure don't concede it.

Q. When you started on the job, Mr. Woolley, and before you were able to start work with your men, did you have any conversations with Mr. Radkovich relative to taking your men off the job until they could do some work? A. I did.

Q. And when was the first such conversation that you had with him?

(Testimony of E. B. Woolley.)

A. After I had had the men on the job for about 10 days I found out that they couldn't do a thing for me, I was trying to get an approximate date from Mr. Radkovich and his superintendent about when they expected to start. And they were having trouble at that time with the aggregate and also with getting their forms over on the job site from the railroad siding. And I told them I could get the men back there fairly fast and until they actually had the material and the forms there, I would like to pull my men off the job, and if they could give me a week's notice, I could get the men back [224] any time they had the material there. And he said, "No;" they were going to start the following Wednesday, I believe it was; they were going to have everything set up and ready to go. Of course, I had been hearing that for quite a while, for 10 days, and I told him that—well, I thought I would pull them off, anyway, and just let him give me a notice when he wanted me back. And he said I had better not do that, and he threatened to back charge me \$500 a day for every day I held them off, if I did pull my men off there. So \$500 a day looked awful big at that time. Everything was going out and nothing coming in. So I just decided I would leave them there.

Q. There was an occasion when you left the job, was there not, Mr. Woolley?

A. Yes, sir.

Q. I show you a letter of mine dated June 4, 1948, directed to Radkovich, and ask you if that

(Testimony of E. B. Woolley.)

was written under your direction and authority?

A. It was.

Mr. Benedict: If I may, if the court please, I would like to read this in order to keep the testimony in orderly form.

“I am writing you on behalf of and as the attorney for E. B. Woolley. Your repeated failures and refusals to comply with your obligations under [225] Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050 between you as contractor and my client as sub-contractor has made it impossible for my client to carry on further and he must now stand on his legal rights. You are, therefore, advised that on Monday, June 7, 1948, he is removing his men and equipment from the job and holds you responsible for all damages sustained by him.

“Furthermore, please be advised that the electrical material remaining on the job site is the property of E. B. Woolley; that it will be padlocked; and that if said material is moved or disturbed in any way, my client will immediately bring civil action against such trespassers.”

The Court: The date of that letter?

Mr. Benedict: June 4, 1948.

The Court: Exhibit what?

Mr. Benedict: That is part of Woolley's No. 10.

Q. Mr. Woolley, did you or not on June 7, 1948 remove your men from the job? A. I did.

Q. And prior to the time you removed your men from the job had you had any conference with Mr.

(Testimony of E. B. Woolley.)

Radkovich relative to your taking that step? [226]

A. I did.

Q. Do you recall about when that was in reference to the date of this letter of June 4, 1948?

A. Around June 1st I would say.

Q. Do you remember where that conference occurred?

A. Yes; it was in Mr. Decker's office.

Q. That is Mr. Decker that is in the courtroom now? A. That is right.

Q. Do you recall who all were present?

A. Yes. Mr. Decker was present, Mr. Radkovich was present, Mr. Bray from the surety company was present, Mr. Radkovich's attorney—I don't recall his name; I think it was Shafer—was present, Mr. Benedict was present, the man that wrote my bonds—I don't recall the name—Paul Doring, he was present, and that is about all I can remember.

Q. Do you remember what was said at that time relative to your pulling off the job and by whom?

A. Well, I don't recall by whom it was said, but it was merely supplying of the electrical fixtures and the chimes and the things we do have in dispute here.

Q. At that time did Mr. Radkovich make any statement as to whether or not he still expected you to supply the fixtures?

A. I believe he said I was still expected to supply [227] the fixtures.

Q. Was anything said regarding the fact that

(Testimony of E. B. Woolley.)

the job had gone past the time for completion?

A. Yes. I brought that part up, that it had gone past date of completion and was going very, very slow, and that I was being delayed and the job was just costing me more money than I could handle for that reason.

Q. Do you remember whether or not Mr. Radkovich said anything about his expecting you to continue on with the work until it was finished?

A. I believe he did. I believe he said that under my contract I was supposed to go ahead no matter how long it took.

Q. Were you having trouble at that time or not in doing your work on the job site?

A. Yes. They were not supplying me with enough work. I had the job over-man-powered for that reason.

Q. Can you tell us, Mr. Woolley, whether or not you would have been able to have completed this job by April 15, 1948 had Radkovich performed his work according to schedule?

A. That is one thing I am positive of. I know I could have, because we were always on top of them, and I done all the pilot models down here in Los Angeles at his yard. When we had enough forms and they were given to us at the proper times, we jumped right on them and wired them. There was [228] nothing that would have held me up from completing on the completion date.

Q. Can you just describe briefly what the steps

(Testimony of E. B. Woolley.)

were in reference to your wiring one of these houses?

A. Well, the first step was, I screwed the electrical boxes to the form, then I run the steel tube from box to box, from switch to switch, and light outlet to light outlet, etc.

Q. Was that in the form before it was poured?

A. Well, it was stated that they were pouring them in series. That is not right at all. They was poured as a complete unit. There was an inner form and outer form. I put this electrical material on the inner form. After I was through installing the electrical tubing in the boxes, then the steel men went on and they put their steel on top of my boxes, and then they put the outer form around, and then they used a hydromatic gun, which was a very large nozzle that poured concrete over the complete building, and coated it up between the inner form and the outer form, and poured the roof and the walls and everything at one set. Then that was allowed to set for a length of time, until it set up, then they pulled the outer form and they pulled the building off of this stationary form, and then before I could get back on that stationary form again to redo the work, they had scraped it and greased it, and that was always delay, because they never had enough units there. We were always waiting to start [229] our work. I always had men standing around waiting to have men go to work on the buildings that were not scraped or were not greased before we could get to them.

(Testimony of E. B. Woolley.)

Q. If Mr. Radkovich's operations had not delayed you, you state that you could have finished by April 15, 1948. Could you have done so or not, without the addition of more men to your payroll during the period from August 28, 1947 to April 15, 1948?

A. I could have.

Q. As a part of defendant Woolley's No. 10 in evidence, I also show you a letter on your letterhead to Radkovich dated June 12, 1948. Did you send that letter about the date it bears?

A. I did.

Mr. Benedict: May I read this letter, if the court please?

"This is to advise you that I shall resume work under Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050, between you as contractor and myself as sub-contractor, on or before the commencement of the work day on Monday, June 14th, 1948.

"Such resumption of work by me shall be without prejudice to any rights or remedies which I may now have against you in connection with, arising out of [230] or under said sub-contract, and, without affecting the generality of the foregoing, particularly those matters referred to in the letters of my attorney, Frank M. Benedict, to you dated April 29, 1948 and May 8, 1948, and shall for no purpose be deemed, considered or construed as a waiver upon my part of any of said rights or remedies.

"You are hereby notified that I shall hold you

(Testimony of E. B. Woolley.)

liable for any and all damages and loss resulting to me in the future from your failure to proceed with reasonable diligence with other work on the job."

The Court: What exhibit is that?

Mr. Benedict: That is one of the letters in Woolley's Exhibit 10.

Q. Mr. Woolley, did you resume work?

A. I did.

Q. And do you know the date that you resumed work?

A. On the 10th, like the letter states.

Q. Well, the letter states the 14th.

A. The 14th, then; I went back on that date.

Q. And that was when you started back again?

A. That is right.

Q. From that time on, will you state whether or not you continued with the job until its completion? A. I did. [231]

Q. Mr. Woolley, when you returned on the job on June 14, 1948, having been away for a week, had there been any time lost in the operation due to your having been away during that period?

A. No, sir.

Mr. Benedict: I believe that is all, your Honor.

The Court: What do you mean by no time lost?

Mr. Benedict: My question, perhaps, was ambiguous. I can see that. Perhaps I had better reframe it.

Q. During the time that you were gone during that week was Mr. Radkovich delayed at all in the

(Testimony of E. B. Woolley.)

performance of the over-all contract?

A. No, sir. That was one of the reasons we pulled off, because there was actually nothing for us to do. They were in the process of hooking the two buildings together, Guniting them together, and there was nothing I could do until they were Gunited. So, to the best of my knowledge, I know they were not delayed.

Mr. Benedict: I believe that is all.

Mr. McCall: May I ask if counsel found and brought into court the estimates furnished to the general contractor by Mr. Woolley?

Mr. McPharlin: No; I did not, Mr. McCall, but you can use those copies that you have.

Mr. McCall: I show you these again, and there are some [232] pencil notations on one or two of them. Would you like to rub that out?

Mr. McPharlin: Oh, I think they should be rubbed off, whatever they are.

Mr. McCall: Will you strike out, then, the part that you object to, that is, the pencil notations?

Mr. McPharlin: Oh, I do not object to anything, Mr. McCall.

Mr. McCall: Thank you.

Direct Examination

Q. (By Mr. McCall): Mr. Woolley, I hand you what purports to be seven estimate statements on your stationery in connection with this job, and ask you if those seven statements were furnished to the Radkovich Company? A. They were.

(Testimony of E. B. Woolley.)

Mr. McCall: May I introduce these seven statements or estimates as the Glens Falls' next exhibit? And should I identify each one or not?

The Court: Oh, they may be one exhibit. You may mark the papers if you wish.

The Clerk: Admitted into evidence, your Honor?

The Court: Yes.

The Clerk: These documents will be Glens Falls Indemnity Company Exhibit No. 13 into evidence.

The Court: Now, what estimates are these?

Mr. McCall: The ones furnished by Mr. Woolley, the subcontractor, to the general contractor or prime contractor.

The Court: At what time?

Mr. McCall: During the progress of the job. It was on these estimates the payments were based.

The Court: Oh, yes, you mean payment estimates?

Mr. McCall: Yes.

Q. I show you these estimates and ask you as to the first one there, dated September 25th, 1947. Is that the one on which you received check No. 1166 October 22, 1947 for \$5,000?

A. That is right.

Q. And the estimate is in the amount of \$9,885.37?

A. That is correct.

The Court: Do you want to mark that "page 1"?

Mr. McCall: It is page—

The Court: Or the date; give us the date.

Mr. McCall: September 25, 1947, but there is one of these, your Honor, contains three pages and

(Testimony of E. B. Woolley.)

I have marked them as to estimates.

The Court: All right.

Mr. McCall: September the 25th, 1947 is the date of this first one.

Q. And that was the same date, October the 22nd, 1947 [234] that Mr. Radkovich testified he gave you an additional \$4,000 as a loan?

A. That is right.

Q. And did you pay him \$500 for that loan?

A. That is right.

Q. I show you estimate No. 2, dated November the 1st, 1947, in the sum of \$16,551.09, and ask you if that is the one on which you received, November the 25th, 1947, a payment from Mr. Radkovich in check No. 1448 in the sum of \$15,000?

A. That is correct.

Q. And this No. 2 estimate contains three pages?

A. That is right.

Q. And now I show you there estimate No. 3, dated November the 24th, 1947, which is in the sum of \$9,165, and ask you if that is the one on which you received the Radkovich Company check December the 30th, 1947 in the sum of \$3,000?

A. That is correct.

Q. And the Radkovich check was No. 1694?

A. That is right.

Q. I show you estimate No. 4, dated January the 12th, 1948, which claims total due \$6,042.97, and I will ask you if that is the one on which you received payment in check 1961, January the 28th, 1948, in the sum of \$3,914.27?

(Testimony of E. B. Woolley.)

A. That is right.

Q. Then I call your attention to No. 5 estimate, dated [235] February the 12th, 1948, in the total sum of \$22,798.50, and ask you if you received anything on that estimate?

A. I believe I received \$18,000 on it.

Q. Is that the one, then, you received by check 2354, March the 13th, 1948, in the sum of \$18,000?

A. That is right.

Q. You heard Engineer Ferguson testify in connection with this one the other day, yesterday?

A. I did.

Q. And can you tell the court how much he allowed you on this when you went to him?

A. He allowed me the full estimate.

Q. What is that? A. \$22,798.50.

Q. Then I will call your attention to estimate No. 6, dated March the 10th, 1948, in the total sum of \$24,799.58, and ask you if you received anything on this estimate? A. No, sir; I did not.

Q. Did you take this particular estimate to Engineer Ferguson? A. I did.

Q. How much did he allow on this estimate?

A. As I remember it, he allowed the whole thing. He stated yesterday he only allowed me \$21,999.58, but this other \$2,800 for work we done, I am sure he allowed me that at the [236] same time. But in any event, he said he allowed me \$21,999.58.

Q. But you got no payment on that estimate?

A. No.

(Testimony of E. B. Woolley.)

Q. Mr. Woolley, let us turn back here to estimate No. 3. It says in part: "Rough installations for 23½ houses @ \$390.00 per house." Did you have a conversation with Mr. Radkovich regarding the change in the method of payment under your subcontract? A. I did.

Q. And where did that conversation take place?

A. In his office.

Q. And was that prior to this No. 3 estimate dated November the 24th, 1947?

A. Yes; it was right after I received No. 2 estimate for \$15,000.

Q. And who was present?

A. Radkovich and Flobeck—I am sure Flobeck was there—and I was talking to Radkovich.

Q. What was said about changing the method of payment under your subcontract?

A. Well, Bill told me that since the rough-in material was on the job and they had paid for it, that he wanted to pay me \$390 a house as labor only, and that he would pay me for any other material in full that I sent up there, but he would pay me \$390 a house labor as they were roughed in.

Q. Can you state to the court, then, the difference between the amount here of \$9,165 and the amount which Mr. Radkovich says he paid you, \$3,000?

A. Well, when I took this estimate over there he said that he could not pay me \$390 a house; that was too much for labor. And he wanted me to take \$200 a house. So we argued back and forth and I

(Testimony of E. B. Woolley.)

finally agreed to take \$200 a house, but I did not even get \$200 a house. He told me he was in financial trouble and if I could take \$3,000, he would make it up on the next estimate.

Q. I call your attention to estimate No. 4, dated January the 12th, 1948, which states in part: "Rough installations for 57 units @ \$200.00 \$11,400.00; Previously billed 35 units \$7,000.00", which shows a total due of \$6,042.97. Can you state why there was a difference between that amount and the amount which Mr. Radkovich claims he paid you, \$3,914.27?

A. I recall that one very plainly. When I went over to his office to get the check, why, he told me that he was still having financial difficulty, and he wanted to know what was the least I could get by with; and I called my office and the bookkeeper figured up just exactly what I had to have for the payroll and what I had to pay out, and that is why it is such an odd figure of \$3,914.27.

Q. That is what you actually had to pay out?

A. That is what I actually had to pay out to keep going; and so he gave me that check and said as soon as he got these payments in from this job and another one that the Government was holding up money, he would make up the difference to me.

The Court: Does that appear on this sheet? What sheet is that, Exhibit what?

Mr. McCall: Your Honor, I have marked it for convenience there; (Indicating to court) fourth estimate, I believe.

(Testimony of E. B. Woolley.)

The Court: Yes.

Q. (By Mr. McCall): No. 5 estimate, dated February 12th, 1948, shows "Rough installations for 77 units @ \$200.00; Previously billed 57 units", and this one claims at \$200, total \$22,798.50.

A. I beg your pardon. It is \$4,000 for the rough, and this is material delivered to the job.

Q. That is \$4,000 at \$200 per unit?

A. That is right. That was the agreement with him, he would pay me \$200 as labor only and any material that I sent up there to the job would be added to it, and they would pay me 100 per cent for the material.

Q. That was the agreement you say you had with Mr. Radkovich regarding the change in the method of payment? A. That is right.

Q. It was after the second estimate?

A. That is right. [239]

Q. Is this the one on which you received Radkovich Company check No. 2354, March the 13th, 1948, for \$18,000? A. That is right.

Q. Do you know the date that you had this conversation with Mr. Radkovich at which time the method of payment was changed?

A. It was either at the time that I received the second estimate or the day or two after that.

Q. Well, with reference to the month of November or October could you state about when it was? A. I believe it was in October.

Q. You heard Engineer Ferguson testify yesterday with reference to the time that you called

(Testimony of E. B. Woolley.)

on him in an airplane trip to find out how much he had allowed on one of the payments?

A. Yes, sir.

Q. And you heard Mr. Radkovich testify briefly on the same point? A. Yes, sir.

Q. Will you state to the court what estimate, if you are able to, that you made this airplane trip to see the engineer about and why?

A. Yes. It was on this estimate that I received \$18,000. I had \$22,798.50 due, and I come from the job site to Radkovich's office and was trying to pick up a check for [240] this amount. And he told me that the Government didn't allow it to me; that they only allowed me \$20,000, I believe he said. I told him I just talked to Ferguson and he said that he had allowed me the full amount. And he said he was wrong about that, he must have thought something else. He said, "However, if you will go up there to Ferguson right now and have him call me or get a note from him that he did allow you that much, why, I will give you a check for it."

So I went over, rented an airplane and flew up to Muroc and found Ferguson and got a note from him stating that he had allowed me the \$22,798.50, and I brought it back to Radkovich's office. And he said he was a liar and he didn't allow me that, and he just crumpled up the thing and threw it in his wastebasket, and said that he would give me a check for \$18,000. And I was broke at the time and owed a lot of obligations, so I took the check for \$18,000.

(Testimony of E. B. Woolley.)

Mr. McCall: That is all, thank you.

Mr. Benedict: If the court please, before Mr. McPharlin's cross examination, there were two or three small items I overlooked. May I ask permission to reopen and go into those?

The Court: Yes.

Mr. Benedict: Thank you. I understand Mr. McPharlin will stipulate with me that Mr. Woolley at all times during the matters here involved was a duly licensed electrical contractor? [241]

Mr. McPharlin: Yes; I will so stipulate.

Further Direct Examination

Q. (By Mr. Benedict): Mr. Woolley, do you have a memorandum there of the items that go to make up your claim for extras? A. I do.

Q. I show you, first, Defendant's No. 6 in evidence, which was, I believe, as you testified, the first working drawing that you were supplied with, is that right?

A. That is right. I helped work this one out.

Q. Will you state whether or not that drawing calls for the supplying by you of chime circuits or chimes? A. No, sir; it does not.

Q. How about phone circuits?

A. No, sir; it does not.

Q. And how about closet lights?

A. No, sir; it does not.

Q. And in connection with the specifications that you had, do they make any provision for the furnishing of those items?

(Testimony of E. B. Woolley.)

A. They say where type numbers are indicated on the plan for the fixtures, and it says where circuits are shown for the chime circuits. There is nothing in the specifications about a phone system whatsoever.

Q. There is nothing in the drawing that indicates any [242] chime circuit at all or chimes, is that right? A. No, sir.

Q. Or any of these other items?

A. No, sir.

Q. Now, I show you Woolley's No. 11, which I believe you testified was the revised plan that was given you some time in September, the latter part of September? A. That is right.

Q. Does that provide for the furnishing of electrical fixtures?

A. Only with a note. It says: "Electrical fixtures in accordance with list to be submitted for approval."

Q. Does it provide for a chime circuit?

A. It does.

Q. Does it provide for a phone circuit?

A. It does.

Q. And does it provide for a closet light?

A. It does; and also for two three-way switches.

Q. Were those two three-way switches provided on the previous plan that I have just shown you or not?

A. No. They had one single-fold switch to control these two lights now that make it so as to control from the kitchen door to the front door.

(Testimony of E. B. Woolley.)

Q. Will you take your memorandum of these items? Can you tell me, first, the cost to you, or, rather, your [243] claim for extras for hanging these fixtures?

A. Yes; it was 1200 man-hours at \$4.00 an hour, \$4,800 labor only.

Q. Is that all that your claim for that consists of, is just the \$4,800?

A. That is right.

Q. In reference to the chime circuits, do you have a claim for that? A. Yes, sir.

Q. And how much is that?

A. I have labor at \$400 and material at \$1,711.80.

Q. What is the total on it?

A. It would be \$2,111.80.

Q. Now, do you have an item there for phone circuits? A. I do.

Q. And what is that amount?

A. 33 $\frac{1}{3}$ man-hours at \$4.00, \$133.33 labor only.

Mr. Benedict: I believe Mr. McPharlin stated yesterday that that item is conceded, or am I mistaken on that?

Mr. McPharlin: No; that is correct. There is no dispute over that item.

Q. (By Mr. Benedict): In reference to the closet lights, do you have any additional claim in that respect?

A. I do. There is 200 man-hours at \$4.00 an hour, \$800 labor, and \$432.54 for material. [244]

Q. And what would the total on that item be, then? A. \$1,232.54.

(Testimony of E. B. Woolley.)

Q. Is there any other claim for extras included in the claim set forth in your complaint of \$8,385.53 or does that total that sum?

A. No; I have a claim for the two small buildings that were lost. They were lost under no fault of mine.

Q. What items did you lose in connection with that?

A. The complete rough-in for the two small kitchen units; that is two separate buildings and they are the kitchens of these buildings that are poured separate, and then they are joined and Gunited together.

Q. And that was the occurrence that I believe Mr. Ferguson, and perhaps Mr. Radkovich has testified to, when two of the buildings cracked and collapsed, is that right?

A. That is right.

Q. What is your claim in that respect?

A. \$107.86.

Q. Have you testified now to all of the items that go to make up your claim for extras of \$8,385.53?

A. I have.

The Court: Is there an exhibit showing all of these extras?

Mr. Benedict: Yes. I think that we would like to offer this into evidence, which does give our capitulation on it. [245] I believe you have a copy on that, have you not? Woolley would like to offer this into evidence as his next exhibit in order.

The Clerk: Admitted, your Honor?

The Court: It will be received.

(Testimony of E. B. Woolley.)

The Clerk: That will be E. B. Woolley's Exhibit No. 14 into evidence.

Mr. Benedict: Thank you for the indulgence, if the court please. That is all.

The Court: These exhibits show the overhead and the labor, material and all those?

Mr. Benedict: It shows everything that he testified to there, your Honor.

The Court: He did not itemize.

The Witness: It is itemized, your Honor.

Mr. Benedict: It is itemized on that statement; yes, your Honor.

The Court: Is it?

The Witness: Yes, your Honor.

Mr. McPharlin: Is there a morning recess, your Honor?

The Court: Yes; we will take a five-minute recess.

(Short recess.)

Cross Examination

Q. (By Mr. McPharlin): Mr. Woolley, I believe you have previously testified that when you received the balance for the electrical work [246] you also received the set of specifications which are in evidence? A. I did.

Q. And you read those specifications, didn't you?

A. I did.

Q. I will hand you the contract and specifications, Radkovich's Exhibit B, and direct your attention to certain parts of that. On page 15-2, under

(Testimony of E. B. Woolley.)

sub-paragraph b. At the bottom of the page, it states, among other things, that "the Contractor shall submit to the Contracting Officer for approval a complete list, in triplicate, of materials, fixtures, and equipment to be incorporated in the work."

You read that, didn't you, Mr. Woolley?

A. I did.

Q. On page 15-3, at the top of the page, sub-paragraph c. It states, in part:

"If the Contractor fails to submit for approval within the specified time, a list of materials, fixtures, and equipment in accordance with the preceding paragraph, the Contracting Officer will select a complete line of materials, fixtures, and equipment. The selection made by the Contracting Officer shall be final and binding and the items shall be furnished by the Contractor without change in contract price or time of completion."

You also read that, didn't you, Mr. Woolley?

A. I did, and I submitted a list of everything I found I was to furnish.

Q. Did you submit a list of fixtures?

A. No, sir; I didn't feel I was to furnish them.

The Court: Which one of those has to do with fixtures, the first one that you read?

Mr. McPharlin: There are several references to paragraphs, yes. The first paragraph I read was on page 15-2.

The Court: All right.

Mr. McPharlin: The second paragraph I referred to was 15-3.

(Testimony of E. B. Woolley.)

Q. On page 15-8, under paragraph numbered 15-19 "Fixtures", it states:

"Where type numbers are indicated on the drawings, the Contractor shall furnish and install all lighting fixtures in accordance with the applicable details." You also read that, did you?

A. I did. I read the one before it, too.

Q. I will hand you the drawings marked Radkovich's Exhibit No. H, of which it has been previously testified that you had a true copy which was delivered to you with the specifications of the electrical drawings as shown on this page, is that correct?

A. That is correct.

Q. I direct your attention to page 6 of these drawings [248] and, on the left-hand side, it has a column of symbols and words, isn't that true?

A. That is true.

Q. The first one shown on it has a symbol of a circle and next to it, it states "ceiling outlet", is that correct? A. That is correct.

Q. On the drawing of the house it does show a ceiling outlet on the kitchen, doesn't it?

A. That is true.

Q. Also, it has a symbol which indicates on the plans as a fluorescent light, isn't that correct?

A. Yes; that is where they are going to hang a fluorescent light.

Q. And it shows on the plans, in the closet, two fluorescent lights?

A. It shows outlets for them; yes, sir.

(Testimony of E. B. Woolley.)

Q. It does not say anything about "outlets", does it?

A. Yes, sir; that is what it means. This explains the symbol so you will know what is there. In other words, various contractors or architects use different symbols, and this is explaining the symbols that is used on that plan.

Q. These refer to fixtures, don't they?

A. No, sir.

Q. Is a wall bracket a fixture?

A. A wall bracket is a fixture; yes, sir. [249]

Q. On the plans doesn't it show a symbol here consisting of a circle and a cross next it which states "wall bracket"; isn't that correct?

A. That means an outlet for a wall bracket; yes, sir.

Q. You have just stated that a wall bracket is a fixture, haven't you? A. That is right.

Q. And this shows a symbol and it states "wall bracket", is that correct? A. That is right.

Q. In the rooms themselves it does show wall brackets, doesn't it?

A. That is right. And here it shows "motor", right here, symbol for a motor, but I did not install no motor. I didn't have to.

Q. We are referring only to fixtures. I have read you the paragraphs in the plans about fixtures, Mr. Woolley. Those plans do show and indicate that wall brackets are to be placed at certain places in the building, don't they?

A. They do.

(Testimony of E. B. Woolley.)

Q. A wall bracket is a fixture, isn't it?

A. It is.

Q. A fluorescent light is a fixture, isn't it?

A. It is.

Q. Now, in making up your bid didn't you consider those [250] fluorescent fixtures and those wall brackets you have just referred to?

A. No, sir; I did not.

Q. And why didn't you?

A. As I stated before, that generally the general contractor moves in on the electrical contractor and furnishes his own fixtures. I presumed that was the case here.

Q. In other words, you just presumed that the contractor was going to furnish the electrical fixtures? A. That is right.

The Court: How did you presume that? Indicate precisely in the specifications how you presumed that.

A. For the simple reason, in the specifications it has "pilot light", it has "motor", it has "motor disconnect means" and lots of things in there that I was not supposed to furnish.

The Court: Was that in the specifications that you bid on?

The Witness: That is right.

The Court: All those matters and things?

The Witness: Absolutely, yes, sir. They are not on the plan.

The Court: Your interpretation is or, rather, your thought is that the fact they were mentioned

(Testimony of E. B. Woolley.)

on the plans does not necessarily indicate that you were to furnish those?

The Witness: No; absolutely not. [251]

The Court: Where is there an indication that they are not to be furnished by you? Is there any indication of that kind?

The Witness: It says "Only where indicated on the plans," and they were not indicated on the plans. The type of fixture I was to furnish of a chime outlet is not on the plan. There is one motor on the plan and it is covered in the specification. It says it will be furnished by other contractor. And also in the specifications it says "pilot lights and switches where indicated on the plan," and there is none indicated on the plan. There is never any basis from any plan that they had that shows what type of fixture or what amount or what kind of a fixture they want in there.

The Court: Where specifications recite that the contractor furnishes fixtures, or whatever he is to furnish, does that indicate to you that you are to, or that some other situation exists?

The Witness: Well, as the specifications say "where indicated on the plan by type numbers," I was to furnish the fixtures; but it never was indicated on any plans.

The Court: There are no type numbers on any plans?

The Witness: No, sir; absolutely on no plans that they have.

The Court: Proceed.

(Testimony of E. B. Woolley.)

Q. (By Mr. McPharlin): Did you consider there was any [252] discrepancy between those plans and specifications?

A. I know there was.

Q. I will hand you Woolley's Exhibit 1; this is your own letter in evidence?

A. Yes, sir.

Q. It states, paragraph 5.

"Check all drawings for errors and discrepancies and report same to this office (Attention J. D. Barrington) so that adjustments can be made with no loss of time."

This was addressed to you and dated August 8, 1947.

A. And I did go see Barrington.

Q. When?

A. Shortly thereafter.

Q. Haven't you previously testified that you brought up nothing on this until you received a copy of the Government plans that you stated made changes?

A. Well, that is true, but I did go to him to see about the fixtures.

Q. When?

A. Shortly after I received that letter. Barrington's office was different from Radkovich's office, and I went to see Barrington about the fixtures.

Q. Did you write to him?

A. No. No; I went to see him in person. [253]

Q. You know Barrington is not here now, don't you?

A. Yes; I know that.

Q. Where is he supposed to be?

A. I tried to locate him. My attorney tried to locate him but we could not.

(Testimony of E. B. Woolley.)

Q. You never took it up with Radkovich?

A. No. Barrington was handling all that for Radkovich at that time.

Q. You never took it up with Mr. Parks in Radkovich's office?

A. Yes; I took it up with Parks, first, and he referred me to Barrington. That was the way I got to Barrington.

Q. You took up the matter of these fixtures with Parks, first, before you took it up with Barrington? A. I believe so; yes, sir.

Q. And when was that?

A. Well, I guess you are right. I guess it wasn't until this fixture deal come up.

Q. Did you think the Government was going to furnish the fixtures?

A. Well, I didn't know.

Q. I want to call your attention on the specifications to page S-1, to the last paragraph:

“Government-Furnished Material or Equipment. The Government will furnish to the Contractor as free issue [254] the following materials and equipment incorporated or installed in the work or used in its performance.” And then it goes down at the bottom and, for the items to be furnished, it states under “Items”—“Kitchen ranges, Refrigerators”, and that is all it states, isn't it?

A. That is right.

Q. You read that paragraph? A. I did.

Q. And you still thought the Government was going to furnish the electric light fixtures?

(Testimony of E. B. Woolley.)

A. No; I thought Radkovich was going to put them in.

Q. Oh, then you thought Radkovich was going to put them in? A. That is right.

Q. I would like to hand you your deposition.

Mr. Benedict, do you have the original deposition?

Mr. Benedict: I have the original that has been signed, but that has not been notarized, but I will stipulate it may be deemed to have been verified. There have been two slight changes made in it.

Mr. McPharlin: I will accept that stipulation that we may consider that it has been verified. It has been read by him?

Mr. Benedict: Yes; it has been read.

Q. (By Mr. McPharlin): I will refer you to the deposition [255] that I have just handed you. Do you recall sometime ago when your deposition was taken, when I questioned you and your attorney was present? A. Yes, sir.

Q. Now I call your attention to page 7 of that deposition and I will ask you to read, beginning at line 8, to the bottom of the page. Read that to yourself. Or beginning at line 3. I am sorry, Mr. Woolley. Now, I will read that to you and then ask you about it, Mr. Woolley.

“Q. Now, a wall bracket, isn’t that a fixture?

“A. Yes, it is a fixture.

“Q. And fluorescent is a fixture?

“A. That is right.

“Q. Then in making up your bid from this

(Testimony of E. B. Woolley.)

plan you did consider these fluorescent fixtures and these wall brackets referred to?

“A. I did not.

“Q. Why didn't you?

“A. There is no possible way to know what type of fixture it is, whether it was going to be a gold finish, a silver finish, whether it was going to be a two-light, four-light, or six-light fluorescent, or anything about the fixture.”

Did I ask you those questions and were those your answers, Mr. Woolley? [256]

A. That is right.

Q. Isn't it true that you did not figure those because you did not know whether it was going to be a gold finish fixture, silver finished fixtures, or what type of fixtures?

A. That is right; I didn't figure them because I didn't know anything about the fixtures.

Q. You knew Radkovich was not an electrical contractor, didn't you? A. I did.

Q. You were the only electrical contractor on this job, isn't that correct? A. I was.

Q. Mr. Woolley, another extra which you have claimed is on the chimes, the chime circuits. I want to direct your attention to page 15-8 of the specifications, paragraph numbered 15-20.

“Signaling System (For Quarters). The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes, as hereinafter described and where indicated on the drawings. The Contractor shall install

(Testimony of E. B. Woolley.)

dual-purpose, 2-toned, bar-type musical chimes. Tones shall be amplified by two short resonating tubes. Tone bars and operating mechanism for each set of chimes shall be completely concealed by an approved [257] ornamental housing. The signal for the rear entrance shall be distinct from that of the front entrance. Push buttons shall be of the flush type"—

and then it goes on giving further directions as to this type of signaling system. You read that paragraph in the specifications, but now you state that you did not include any chimes or chime circuit on your contract as you feel that you were not obligated to furnish them?

A. No, sir. I took that up with Bill Radkovich, himself, when I was figuring the job and he said, "If it is not in the plan, just forget it."

Q. When did you take that up with Radkovich?

A. The day after I took the plan to him the first time.

Q. What did you tell him? What was the conversation?

A. I told him in the specifications it called for a signal system and on the plans it didn't show any. He said, "That has been taken out. Just forget it."

Q. He said it had been taken out?

A. That is right; and it was taken out. There was nothing in the plan.

Q. Nothing at all? A. Nothing at all; no, sir.

Q. Did you hear the testimony of Mr. Ferguson, the resident engineer? A. I did. [258]

(Testimony of E. B. Woolley.)

Q. And he stated that the plans made reference to chime circuits? A. He did.

Q. And don't they? A. No, sir.

Q. Do you recall him pointing out down here to the chime circuit? A. I do.

Q. Wasn't what he said the truth?

A. Well, he probably thought it was the truth, but that is on a breaker panel. It has nothing to do with the wiring system at all. That is a load center.

Q. It shows the chimes circuit on the breaker panel?

A. It shows a breaker for a chime circuit.

Q. I see. And then you state that you took that up with Radkovich and he said it had been taken out of the plans, is that correct?

A. That is right.

Q. And that was before you put in your bid or afterwards? A. Before I put in my bid.

Q. Who else was present at the conversation?

A. I believe just Radkovich and myself.

Q. Where were you?

A. At his office. They were still wiring the pilot models there. [259]

The Court: How did that discussion arise or how did the question arise in your mind?

The Witness: Well, because I went and took the specifications and the plans and I marked the things that were not on the plans that were called for in the specifications.

The Court: Did you make a list of them?

(Testimony of E. B. Woolley.)

The Witness: Yes, sir. It is in my set of specifications.

The Court: That was before you signed your contract?

The Witness: Yes, sir.

Q. (By Mr. McPharlin): Did you furnish Radkovich with such a list?

The Court: I did not hear the question.

Q. (By Mr. McPharlin): Did you furnish Radkovich with such a list?

A. Not a written list, no, sir. I had the specifications right there and was showing him what I was talking about.

Q. Did you have fixtures on that, too?

A. I don't recall whether they were on there or not.

Q. Then it was not a list of everything that you did not consider was on the plans?

A. It might have been. If I can look at my specifications, I can tell you.

Q. You don't know without looking. Haven't you just previously told us that the first time that you ever brought up the question of the fixtures was sometime after your contract [260] was signed?

A. That is right.

Q. Is it now your testimony that before the contract was signed you took it up with Radkovich?

A. Not about the fixtures; no, sir. But there was other various things on there that it called for that

(Testimony of E. B. Woolley.)

were not on the plans that I took up with him.

Q. But you did not take up the question of fixtures with him? A. No, sir.

Q. When you first submitted your bid on this job how much was your bid?

A. Seventy five thousand. That was an oral bid.

Q. Did Radkovich accept it?

A. Yes. He called me the next day and accepted it.

Q. I notice that your subcontract is \$80,000. How does that happen?

A. Well, I refigured it and I found out that I was mistaken in thinking that the army was furnishing the heaters; that I was supposed to furnish the water heaters. And I went back over and told him I couldn't take the job because I had overlooked a big item there of the water heaters, and for that reason I couldn't take it at the figure of \$75,000. And he asked me what I could take it at and I called a local wholesale house for an approximate figure from them, and they [261] gave me a figure of \$6,100 for 100 water heaters. And I quoted that figure to him and he said he couldn't allow me that \$6,100; he would give me \$5,000, or he would give me \$80,000 and make it a round figure.

Q. And you gave him a quotation of \$61.00, or a total of \$6,100 for the water heaters?

A. That was a rough quotation. I just called one wholesale house. That is right.

Q. Then you state that in figuring this bid you had overlooked the water heaters, is that correct?

(Testimony of E. B. Woolley.)

A. That is right.

Q. And when you told Radkovich about it, he agreed that you could increase your bid or increase the contract price another \$5,000, is that correct? A. That is right.

Q. Did you tell him you had overlooked anything else? A. No, sir.

Q. You knew Radkovich was depending on you to do the electrical work on this job, didn't you?

A. That is right.

Q. You never asked him whether he was going to furnish the fixtures, did you? You never asked him?

A. Nothing until it come up about it; no, sir.

Q. On the phone circuits you have agreed to that labor charge of \$133.33. That was something that the signal corps [262] up on the Muroc base decided that they would like to have you put in, wasn't it?

A. I believe that is what it was.

Q. Yes. And they talked to both you and Radkovich about it, didn't they?

A. Well, I didn't know anything about it until I went up there, and Radkovich's man was going to do it himself and my superintendent or my foreman was squawking, because it didn't come under union—*it* mean it come under the union agreement, and they wouldn't allow them to do it. So then, Bill hired me to do it.

Q. Did you ever submit your shop drawings for the work that you were to do on the job?

A. I did.

(Testimony of E. B. Woolley.)

Q. When were those submitted?

A. About September the 22nd, 1947.

Q. Who did you furnish those to?

A. Radkovich's office and a copy to the electrical inspector.

Q. Are those the ones that you went over to the engineers' office with?

A. No, sir.

Q. Are your shop drawings in evidence here?

A. They are, sir.

Q. Which ones are they? [263]

A. They are the photostatic copies in the Army Engineers' files.

Q. Those were approved, were they?

A. No, sir; they were not.

Q. You knew that your shop drawings were required to be approved by the army before you went ahead with your work, isn't that correct?

A. Well, they were not turned down because they were not right. I don't believe they ever reached the army.

Q. Didn't you just say you got these from the army files?

A. That is right. But I don't believe they ever went in there for approval. It just showed location changes only. There were nothing changed on the plan. They were just location changes.

Q. You never did work under those because you never got an approval on them from the army?

A. That is right. I received an approved plan back from the army that had these extra things

(Testimony of E. B. Woolley.)

written in it, and that it what I went to see the army about.

Q. Now, Mr. Woolley, you have put in a claim which you have called "damages" for delay, for pay roll from August 28, 1947, to October 1, 1947, in the amount of \$1,149.22. Isn't it true that that consists of your total pay roll from the time you first went on the job, August 28th, up until October 1st? A. That is true. [264]

Q. And isn't it also true that your men worked up there during that period on this job?

A. Well, that was nonproductive labor, except I said yesterday there could have been a week that they did prefab.

Q. There might have been a week?

A. There might have been a week; yes, sir.

Q. That they did do some work?

A. That they did do some work.

Q. And did the prefabbing?

A. Yes, sir; about a week.

Q. And for this type of construction prefabbing is the ordinary type of doing a job of this type?

A. After you have an approved plan; that is right.

Q. But you never got any plans there which were approved prior to October 1st, did you?

A. No, sir. No, sir.

Q. That \$1,149.22, then, is not all nonproductive work?

A. No. There could have been a week in there that they did some prefabricating.

(Testimony of E. B. Woolley.)

The Court: How much would that amount to?

The Witness: \$200. I paid them \$100 a week, each man. I had two men there.

Q. (By Mr. McPharlin): Mr. Woolley, on this job up in Muroc isn't it true that you did not personally superintend this work? [265]

A. Well, it was under my supervision. I was on the job every week. I wasn't there every day.

Q. You would be up there ordinarily once a week, wouldn't you?

A. That is right; yes, sir, or any time they called me for difficulties.

Q. You had a foreman or superintendent up there on the job?

A. I had a foreman up there; that is right.

Q. You have no personal knowledge yourself of having been up there on each one of these days and seeing how much each of these men did, do you?

A. Well, for the first—

Q. No. Can you answer that question, whether you were personally up there each day and saw what each of these men were doing?

A. At the start of the job I was there, quite naturally; yes, sir.

Q. Well, were you there all the time?

A. Not all the time; no, sir.

Q. On an average of once a week, wasn't it?

A. No; not at the start of the job. I was up there, I would say, three days out of the week.

Q. You would not be up there all day long; you just made trips up there and back, didn't you?

(Testimony of E. B. Woolley.)

A. I was up there all day long on various occasions, when we were going over the plans up there and giving directions to the men what they were to do.

Q. You had other jobs going in Los Angeles at that time? A. Absolutely; yes, sir.

Q. You were taking care of these other jobs, also, weren't you?

A. That is right. I had a foreman here, locally, too.

Q. For the period of April 15, 1948, to October 6, 1948, you have claimed damages for delay of \$15,027.30. Now, that consists of your total pay roll from April 15th to the end of the job, October 6th, is that correct? A. That is correct.

Q. And you are claiming that as your damages for delay in that period, is that correct?

A. That is right.

Q. Now, isn't it also true that you have claimed as an extra labor for installing the fixtures and chimes and the phone circuits, closet lights, etc., those extras for labor in the amount of \$6,149.33? You have claimed that as extra labor, haven't you, to which you are entitled? A. That is right.

Q. Now, isn't it true that those fixtures, the chime circuits and those closet lights, that that work was installed in that same period of April 15 to October 6, 1948? [267]

A. I believe that is right; yes, sir.

Q. Then you have duplicated that labor charge, haven't you? A. Yes; I guess so.

(Testimony of E. B. Woolley.)

Q. You heard your counsel stipulate to the propriety of the claim by Westinghouse of \$26,000 some dollars plus interest, and I believe you admit that you owe that money to Westinghouse, is that correct? A. I do.

Q. And that obligation to Westinghouse is for materials furnished on this job, is that true?

A. That is right.

Q. And those materials are not involved in any of these extras, are they? A. Yes; they are.

Q. There were no fixtures on the Westinghouse bill, were there?

A. No, sir; there were no fixtures.

Q. The chimes were not in there?

A. No, sir; but all the wiring for the chimes was in there.

Q. Wiring?

A. Wiring, steel tubing, boxes, and so forth.

Q. You had received, which I believe you agreed to, up to April you had received actual payments from the Radkovich [268] Company, which I believe you have admitted, of \$48,914.27; isn't that correct? A. That is correct.

Q. Out of that \$48,914.27 how much did you pay to Westinghouse who was furnishing your materials on this job?

A. \$9,800, a little over that, but that is about the total sum.

Q. Would it refresh your recollection if I stated the amount was only \$9,108?

A. That is probably correct.

(Testimony of E. B. Woolley.)

Q. And there was over \$40,000, in addition, that you had received but you had not paid anything to Westinghouse out of that other \$40,000?

A. That is right.

Q. Isn't it true that on those progress estimates that you received from October up through March, a large part or a substantial part of those progress estimates consisted of payments made to you on the basis of materials on the site?

A. On one occasion, yes, when I got the \$15,000.

Q. For example, the one on March, wasn't there around an eighteen or nineteen thousand dollar payment for materials on the site?

A. Yes. Yes; that is right.

Q. You did not make payment to the material supplier on that, did you? [269]

A. No, sir. I was way behind on my pay roll then.

Q. And at that time you had several other jobs going in Los Angeles, didn't you? A. Yes, sir.

Q. Now, I believe you have previously stated that you walked off this job and that you were off for about a week, is that correct?

A. That is correct.

Q. Isn't it true that the Gunitite man was working there at the time, Guniting these buildings?

A. I believe they were building forms before the Gunitite man.

Q. You were not up there that week, were you?

A. No, sir.

Q. You do not know just what actually was tak-

(Testimony of E. B. Woolley.)

ing place, of your own knowledge during that week, do you? A. No, sir; I do not.

The Court: How did you arrive at that \$15,000 item of damage for delay?

The Witness: That was the length of time that it took me to finish the job after the job was supposed to be finished. I was delayed by the prime contractor from finishing the job on April 15th, and it took that \$15,000 to go ahead and finish the job. That was the labor on it.

The Court: Labor from August 28th to October 1st, is [270] that it?

The Witness: No. It was the other delay, from April 15th to October 6th, 1948.

The Court: Is that where your item of \$15,000 comes in?

The Witness: That is right; yes, sir.

The Court: April 15th to October the 6th?

The Witness: That is right, yes, sir; 1948. The other delay took place in '47.

Q. (By Mr. McPharlin): You have stated, in making references, "to when the job was supposed to have been completed." What do you mean by that, Mr. Woolley?

A. When I was completely through with all the work that I was to do there.

Q. Now, you stated, "if the job had been finished when we were supposed to have been completed." When was that? A. April 15, 1948.

Q. What is your basis for stating that?

Mr. Benedict: I believe the contract speaks for

(Testimony of E. B. Woolley.)

itself. The subcontract provides that he shall complete the job April 15, 1948.

Mr. McPharlin: For the purpose of the record, the subcontract states:

“The subcontractor * * * further promises and agrees to prosecute all of his work hereunder diligently and to co-ordinate his work with the work of other persons so that the subcontract may be completed on or before [271] the fifteenth day of April, 1948.”

Q. Did you co-ordinate your work with the other subcontractors? A. I did.

Q. By co-ordinating your work, that means, doesn't it, that you have the necessary employees and the proper force available to carry on your part of the work; isn't that right?

A. I did, and I always did have there.

Q. You have heard Mr. Ferguson, the engineer, testifying that you had sufficient men, I believe he said, to do your part of the work; but he also stated that you were not overstaffed. Do you disagree with him? A. I do.

Q. He also stated that if the progress of this work had been increased two-fold, why, you would have had to increase your staff two-fold; do you agree with that? A. No, sir; I do not.

Q. In addition to these items of these claims that you have put in, Mr. Woolley, have you added anything in addition to what you have claimed are your costs on it? A. Only the labor.

Q. What did you add onto the labor?

(Testimony of E. B. Woolley.)

A. The profit and overhead write-up on the labor.

Q. How much of a profit and write-up did you add onto the labor? [272]

A. In percentages I don't know exactly. It is from the Biddle Book, which is the trade journal giving the write-ups.

Q. Didn't you testify previously that you had added one 15 per cent item and then another 10 per cent item?

A. I believe that is what it amounts to in the front of their book, how they arrive at their labor charge.

Q. So you increased it, you added another 25 per cent onto the labor cost, is that correct, onto your direct labor cost? A. That is right.

Q. So in addition to duplicating your labor charge between the labor you claim for damages and the labor you claim for fixtures at Muroc, you also added another 25 per cent?

A. Legitimate write-up; that is right.

Q. How did you arrive at this labor claim that comes out to an even \$4,800 for hanging fixtures? Do you have an actual log book on that?

A. I do.

Q. Where is the log book?

A. In my briefcase over there.

Q. Will you produce the log book?

The Court: We will suspend at this time.

Mr. McPharlin: Yes, your Honor.

The Court: Resume at 1:30. [273]

(Testimony of E. B. Woolley.)

Mr. McPharlin: Yes; 1:30 is agreeable.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, Friday, May 19, 1950.) [274]

Los Angeles, California,
Friday, May 19, 1950, 1:30 p.m.

Cross Examination—(Resumed)

The Court: Proceed.

Mr. McPharlin: Yes, your Honor.

Q. (By Mr. McPharlin): Mr. Woolley, you have testified that prior to entering into this subcontract you had a discussion with Mr. Radkovich in reference to the chimes, and he told you that you would not need to figure them, is that right?

A. That is right.

Q. Now I will show you a letter on your letterhead, addressed to Mr. Parks of the Radkovich Company, which is dated September 24, 1947, which purports to be signed by you and ask you if that is your signature?

A. That is my signature.

Q. And did you send that letter to the Radkovich Company? A. I did.

Q. This letter is dated September 24, 1947, which was almost two months after you entered into the subcontract, wasn't it? A. Yes, sir.

Q. In this you state:

“Dear sir: [275]

“In handling the preparations for the above job,

(Testimony of E. B. Woolley.)

it has come to our attention that there are some intended additions to the work as originally specified.

“These items are as follows:

“1. The addition of a telephone outlet in each resident, exact location unknown.

“2. The addition of a front and back door signalling system, including a two-tone chime, transformer and push buttons.

“If these additions are to be made would you please confirm same by letter, giving complete details.”

“As it is our endeavor to do everything possible to expedite the production of these houses, we will take the necessary steps to include these items in the installation immediately upon receiving your confirmation. Renegotiation of the subcontract, which is necessitated by these additions, can be done at a later date.

“Yours truly,

(signed) E. B. Woolley”

Is that the letter you sent?

A. That is right.

Q. You have made no reference in this letter to any previous conversation with Mr. Radkovich in reference to chimes, have you? [276]

A. No, sir.

Q. And you state here that in handling the preparations, it has come to our attention that there are chimes to be placed in these houses, is that

(Testimony of E. B. Woolley.)

right? A. That is right.

Q. And this was approximately two months or more before the time you were supposed to have had the discussion with Mr. Radkovich in reference to the chimes?

A. I think that is when I seen that other plan.

Mr. McPharlin: We will offer this into evidence as Radkovich's next exhibit in order.

The Court: It may be received.

The Clerk: That will be Radkovich's Exhibit M into evidence.

Q. (By Mr. McPharlin): Also you make no reference in that letter to fixtures, do you, Mr. Woolley? A. No, sir.

Q. I believe you have previously testified that the question of fixtures was not brought up until you came in in the latter part of August and had the discussion with Mr. Parks that we have gone into, isn't that right? A. That is correct.

Q. But you state that you had a discussion in reference to chimes with Mr. Radkovich before you signed the subcontract?

A. That is right. [277]

Q. Your subcontract was signed July 30, 1947, was it, Mr. Woolley? A. That is right.

Q. When did you have that discussion with Radkovich?

A. Before that date. I don't recall how long before that date.

Q. When did you first start figuring your bids on this job?

(Testimony of E. B. Woolley.)

A. About 30 days previous to the signing of the contract.

Q. July?

A. I would say so. I think it was around the 15th of July I took the plans home.

Q. Around the 15th of July you took the plans and specifications? A. That is right.

Q. Mr. Woolley, look on your deposition at page 4. A. I don't have one now.

Q. On page 4, at lines 16 to 18, or you may read from line 11 down to line 22, I believe. Now, I will read the questions and the answers that I have referred to, Mr. Woolley.

“Q. About when was it that he asked you if you would like to figure the job? And in reference to that question I might state that your subcontract [278] is dated—

“A. I know, it's July 30th.

“Q. Yes, if that helps you.

“A. It was around the 15th of June when he delivered me this plan I have and the set of specifications that I have.

“Q. Around June the 15th?

“A. June the 15th, I believe it was. It was late in June. I would say it was after the middle of the month, or around the middle of the month.”

Is that true? Was that your answer to my questions? A. That is true.

Q. So you had the plans and specifications for approximately a month and a half before you entered into or signed the subcontract, is that right?

(Testimony of E. B. Woolley.)

A. That is right.

Q. And during that month and a half, I believe you have already testified that you assumed the prime contractor would furnish the electrical fixtures, but that you never brought that to his attention; you never asked him about it?

A. No; I guess that is right, because that is the general plan around Los Angeles and the way they do those things.

Q. That during that time you assumed that he would furnish the chimes, also, but you state that you did have a [279] conversation with him about the chimes?

A. That is right; I had a conversation about the chimes and the pilot lights and motors, motor disconnects. I don't recall the fixtures. I probably took it for granted that they were not on the plan, just to leave them off like he told me with the chimes, not to figure them.

Mr. McPharlin: You may have the witness.

Redirect Examination

Q. (By Mr. Benedict): Mr. Woolley, can you tell us what is meant by "type numbers" in reference to fixtures?

A. That would be catalog numbers describing the fixtures and the price of the fixture.

Q. And can you give us an example of a type number?

A. Well, it would be, say, a Wagner-Woodruff

(Testimony of E. B. Woolley.)

fixture No. 132, would be a kitchen fixture at a set price.

Q. Can you state whether or not that, in the terminology of your trade, is what would be indicated on a drawing if the type numbers of the fixtures are set forth?

A. That is what would be indicated; that is right.

Q. These symbols that Mr. McPharlin has questioned you about that appear on the drawings, which refer to wall brackets or ceiling lights and what not, or fluorescent lights, are those symbols the same thing as type numbers?

A. No; they are not. They are used by—they have a [280] reference down there because different architects use different symbols; and that is just to show what is meant by a ceiling outlet, what is meant by a bracket outlet, and what is meant by a duplex receptacle, and what is meant by a switch.

Q. Will you state whether or not those symbols that appear on the drawing, that is, the first drawing that you had, relate to outlets, that is, to the fixture that is to go in the outlet?

A. No; they do not.

Q. Can you state whether or not those symbols merely refer to the type of outlet that is to be installed? A. That is correct.

Q. And the type of outlet is not the same thing as the type of the fixture, is it?

A. Absolutely not.

Q. Can you state whether or not it is true that

(Testimony of E. B. Woolley.)

for a wall bracket, for example, there are numerous type numbers that are applicable to a wall bracket?

A. That is right. I would say that there were thousands and thousands of type numbers.

Q. Would that likewise be true as to ceiling outlets and all of the other types of outlets that are indicated there? A. Absolutely, absolutely.

Q. In reference to a fluorescent type outlet, can you state whether or not it is true that there are numerous types [281] of fluorescent fixtures?

A. There are numerous types and numerous manufacturers.

Q. Can you state whether or not it is true that the type of outlet is merely an indication of the general classification of the fixture that is to be used in conjunction with that outlet, and does not indicate in any way that particular fixture that is to go in it? A. That is true.

Q. I call your attention to Radkovich's No. M that you have just identified, and ask you whether or not this letter was written by you after you had received the second drawing?

A. Well, it was after I received the third drawing.

Q. After you received the third drawing?

A. That is right. It was not approved yet, but it was a drawing that was submitted and I had a copy of it, and my men give it to me on the job. It was a copy they were told they were supposed to wire to. My foreman gave it to me, and it was not approved yet, but that is what I expected later.

(Testimony of E. B. Woolley.)

Q. The conversation that you testified you had with Mr. Radkovich in which he stated that you need not worry about the chimes or the circuits if they were not on the drawing, will you state whether that conversation was in reference to the first drawing that you had?

A. Yes; it was. It was before I signed the contract, and I never seen any other drawing until after I signed the [282] contract.

Q. Will you state whether or not it is true that you wrote this letter of September 24th, 1947, Radkovich's No. M, after you had been supplied with the third set of drawings?

A. That is correct.

Q. Calling your attention to August, 1948, were you having any difficulty at that time in proceeding with your work in reference to some wall heaters that were to be installed?

A. Yes; I was.

Q. What was the difficulty at that time?

A. The Wm. Radkovich Company removed the heaters from my store room and sent them to Los Angeles to have something they made a phone deal with the army to install in them, and I could not install them because they were not there. I might add, they removed them under protest. I never gave them permission to remove them. They shouldn't have been removed.

Q. I call your attention to Radkovich's No. L, being the letter from Mr. Ferguson of July 26, 1948. Was it during that period that you were hav-

(Testimony of E. B. Woolley.)

ing your difficulties in proceeding with the installation of the heaters?

A. I believe it was.

Q. Did you ever have a conversation with Radkovich relative to your installing the fixtures?

A. I did. [283]

Q. And when was that conversation?

A. That I can't remember.

Q. Was it in 1948 or in 1947?

A. I believe it was in '48.

Q. Was it around April, when your contract was to have been completed, or before that?

A. April 15th of '48?

Q. Was it around that date?

A. That we discussed the fixtures?

Q. Yes.

A. No. It was before that. Well, I guess—I can't remember exactly the date. It might have been around that date.

Q. In any event can you recall whether or not it was the first part of 1948?

A. I think it was in the first part of 1948.

Q. And where did that conversation occur?

A. In Mr. Radkovich's office.

Q. And who else was present?

A. Parks, I suppose. He was there all the time.

Q. And what was said relative to your hanging the fixtures?

A. Well, they said if they bought them and took them up to the job, why, would I install them? I said if he would pay me for installing them, I

(Testimony of E. B. Woolley.)

would be glad to install them. [284] And he agreed he would pay me for installing the fixtures. And he also said that we would argue about who was going to pay for the fixtures later on in the job.

Mr. Benedict: I believe that is all, if the Court please.

Mr. McCall: Nothing further from the surety.

Mr. McPharlin: I have a few more questions I would like to ask, your Honor.

Recross Examination

Q. (By Mr. McPharlin): You said that Radkovich also agreed to pay you for installing the fixtures?

A. Installing the fixtures; yes, sir.

Q. I want to call to your attention your letter of June 12, 1948, your Exhibit No. 10, which is addressed to "William Radkovich Company, Inc.," wherein you state:

"Gentlemen:

"This is to advise you that I shall resume work under Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050, between you as contractor and myself as sub-contractor, on or before the commencement of the work day on Monday, June 14th, 1948.

"Such resumption of work by me shall be without prejudice to any rights or remedies which I may now have against you in connection with, arising out of [285] or under said sub-contract, and, without affecting the generality of the foregoing,

(Testimony of E. B. Woolley.)

particularly those matters referred to in the letters of my attorney, Frank M. Benedict, to you dated April 29, 1948, and May 8, 1948, and shall for no purpose be deemed, considered or construed as a waiver upon my part of any of said rights or remedies.

“You are hereby notified that I shall hold you liable for any and all damages and loss resulting to me in the future from your failure to proceed with reasonable diligence with other work on the job.”

You made no reference in there to any oral agreement, did you, Mr. Woolley? A. No.

Q. Did you get any written agreement on this promise to pay you for the labor of installing fixtures? A. Out of Radkovich?

Q. Yes. A. No, sir.

Q. Did you obtain a written agreement of any kind on a promise to pay you for the chime circuits? A. No, sir; I took him at face value.

Q. These were all oral conversations?

A. That is right.

Q. Nobody else was present? [286]

A. Well, probably Parks was.

Q. And you made no reference to it in any of your correspondence?

A. Only that one letter; that is the only thing.

The Court: Is there anything in the contract or specifications requiring something in writing for additions or changes?

Mr. McPharlin: Yes; there is, your Honor. In the subcontract, paragraph 2, it states the consideration of \$80,000 and then goes on to state:

(Testimony of E. B. Woolley.)

“All of such work to be done, services to be rendered and materials to be furnished shall be in strict accordance with the specification, schedules and drawings applicable, all of which same hereby are made a part hereof, and none of the same may be altered, changed or modified in any manner or respect without the written consent of the contractor being first had and obtained.”

It also goes on further in paragraph 5, at the bottom of page 2:

“Subject to the approval of the United States of America through its duly authorized representatives with respect to said principal contract, or at the request or direction of said United States of America, or its duly authorized representatives, the contractor, [287] by written order, may change the extent or amount of the work covered and to be covered by this sub-contract, * * * ”

It refers again to “written order.”

Mr. McCall: May I ask what paragraph that was of the subcontract?

Mr. McPharlin: Paragraph 5.

The Court: What about additions; is there any clause on additions?

Mr. McPharlin: Just a moment. In the subcontract it makes that provision I have just read, in two places, as to written change orders, and then it goes on in reference to an “equitable adjustment” by saying: “but if any such change causes a material increase or decrease in the amount or character of such work, the contractor will make such equit-

(Testimony of E. B. Woolley.)

able adjustment as may be authorized and approved by the United States of America of and in connection with the consideration and payments to be made to the sub-contractor hereunder.”

The Court: You would consider an addition as coming in under that category?

Mr. McPharlin: Yes, your Honor.

The Court: Of alterations or changes?

Mr. McPharlin: Yes; I would certainly consider any change [288] that would alter that sub-contract price would certainly be a change which would require a written order.

Q. You have mentioned about not having exact type numbers of fixtures in these specifications. Isn't it true that also on other electrical materials they did not have exact type numbers or brand names, but that you submitted to the Government a catalog and also a list of the electrical materials that you were going to use for their approval?

A. That is correct; but they give a certain specification of the material to be used. It had to come up to that Government specification, and that requires or gives two or three brand names of the material that you could use.

Q. All specifications do not give you the brand names, do they, Mr. Woolley?

A. I believe they do; yes, sir.

Q. Will you show me where they give you the brand names that you must submit in these specifications?

(Testimony of E. B. Woolley.)

A. If you will hand me one, I will be glad to look. Section 15.

Q. I have that. A. 15-01, page 15-1.

Q. I have that.

A. You see "a. Federal Specifications."?

Q. Yes.

A. There it goes ahead and gives everything to be used [289] in the house.

Q. Where does it give the brand names?

A. Well, I picked up the Federal specifications to get those brand names.

Q. Then they are not in these specifications?

A. No. They give the numbers of the Federal Specifications. They are general and they apply to every job.

Q. In other words, on ordinary electrical materials you, yourself, had to make up and submit to the Government in detail just exactly what brand name and the catalog list, etc., of the exact materials for their approval, isn't that correct?

A. Yes; all approved Federal specifications.

Q. Then they would approve it?

A. That is right. You had three or four choices in there, and then they would approve any leading or any first line of these three companies or four companies.

Q. Yes. And subsequently, after all of this dispute, in fact you did go back on this job under the terms that we have referred to, and you did also submit a list of electrical fixtures and they approved it, didn't you?

(Testimony of E. B. Woolley.)

A. Yes. I had one heck of a time getting them to. The army didn't know what they wanted. Nobody knew what they wanted. And finally they made up a list of fixtures that they did want, but with the prices, for Wm. Radkovich Company.

Q. And you submitted that list and they approved it, [290] didn't you?

A. I done it at Mr. Radkovich's insistence; that is right.

Q. That is what I mean; you did submit a list of electrical fixtures and the Government did approve that?

Mr. Benedict: May I ask, Mr. McPharlin, if you are referring to the letter that we wrote?

Mr. McPharlin: Yes; there is a letter from Mr. Woolley submitting to the Government a list of electrical fixtures, and the Government approved them, and those were the fixtures that were installed, weren't they?

A. That is true, but I had to go to the Government.

Mr. Benedict: I just wanted it clear there we submitted the list and made our position clear. We did not feel obligated to do so.

Mr. McPharlin: There is no dispute about it, Mr. Benedict, that at the time you submitted that list you were denying liability?

Mr. Benedict: Yes; that is what I want to make clear.

Mr. McPharlin: That is true. I will admit that.

The Witness: I want to bring out about there

(Testimony of E. B. Woolley.)

was nobody that knew what type of fixtures to go in this type of building. There was no specifications for the fixtures.

Mr. McPharlin: No further questions, your Honor.

Mr. Benedict: That is all. Excuse me just a minute. [291]

Redirect Examination

Q. (By Mr. Benedict): Mr. Woolley, during the noon recess have you checked the point Mr. McPharlin called your attention to, that the item of \$4,800 for hanging the fixtures is duplicated in the charge for the item for delay?

A. Yes; I have, and I believe that it is correct; it was a bookkeeping error that it came in that way.

Mr. Benedict: If the Court please, in connection with the amendment to our cross-claim that I desire to file along the lines indicated yesterday, I would like to also correct that error. It is purely an inadvertence. Perhaps it is my fault. I don't know. We did not intend to make any such duplication as that.

The Court: Very well.

Mr. Benedict: And while I am filing my amendment, I will also correct that item, too.

Mr. McPharlin: Is that all, Mr. Benedict?

Mr. Benedict: That is all.

Mr. McPharlin: I have another question, if I may.

(Testimony of E. B. Woolley.)

Recross Examination

Q. (By Mr. McPharlin): Mr. Woolley, your subcontract provides, on page 1, the fourth paragraph or the third paragraph—the third and fourth paragraphs, I believe—that the principal requires the [292] contractor to perform certain services, to furnish certain labor and materials, etc.; that you have read and are fully familiar with the terms and provisions of the principal contract and the rights, powers, benefits, duties and liabilities of the contractor. And further on it states that you agree to discharge certain of the duties of the contractor and to be bound by the obligations of the prime contract insofar as your work is concerned. Now, we have made previous reference to the completion date and you have also made a number of references to April 15th. Do you know that there is a change order in that prime contract extending the completion date?

A. No, sir. I have never seen the prime contract.

Q. Do you know that there is a change order extending the completion date to the first day of June, 1948?

A. That is the first time I have ever seen it.

Q. Were you assessed any penalty by the prime contractor or anybody else because your work was not completed by that date?

A. Good God! I couldn't complete it. He wasn't ready for me to complete it.

Q. Would you answer the question, though?

(Testimony of E. B. Woolley.)

A. No.

Q. There was no penalty assessed against you by anybody, was there? A. No. [293]

Q. There were numerous other subcontractors also on this work, weren't there?

A. That is right.

Q. There was a Gunitite subcontractor, wasn't there?

A. I believe he was broke on the job.

Q. He went broke on the job?

A. I am quite sure of it; yes, sir.

Q. I guess everybody went broke on the job, didn't they? A. Almost; yes, sir.

Mr. McPharlin: Including the prime and all the subs. No further questions.

Mr. Benedict: That is all.

Mr. McCall: Nothing further.

Mr. McPharlin: Do you rest, Mr. Benedict?

Mr. Benedict: Yes. Woolley rests, if the Court please.

Mr. McPharlin: Does the Glens Falls rest?

Mr. McCall: I would like to know if the cross-plaintiff against the surety Glens Falls has brought into Court today the data requested in Glens Falls' Exhibit No. 8 which Mr. Parks, I believe, testified to yesterday.

Mr. McPharlin: I believe that was the personal notes of Mr. Parks' with reference to his phone call that he testified he made to you, Mr. McCall.

Mr. McCall: Well, I would be satisfied with any data which would answer the questions, which I

have never been able [294] to get; and if the counsel has it now, we can read the questions again and I will take the evidence now the same as if it had never been asked for.

Mr. McPharlin: As I understand, Mr. McCall, the answer to your question is in the letter of July 8th from the prime contractor to the Glens Falls Indemnity Company.

Mr. McCall: Is that in evidence, Mr. McPharlin?

Mr. McPharlin: Yes; that is in evidence.

Mr. McCall: I wish you would call my attention to that. I will see if the answer is there.

Mr. McPharlin: Okay. The exhibits of Radkovich. There is a full-page letter dated July 8th, addressed to "E. B. Woolley," a carbon copy to Glens Falls Indemnity Company, a signed post office receipt, setting out the default in detail of E. B. Woolley as claimed by Radkovich.

Mr. McCall: Then may I read these questions and would it be all right for counsel to read the answer contained in that letter? The first question——

Mr. McPharlin: I think it is better just to refer the exhibit to you, Mr. McCall.

Mr. McCall: I claim it is not in there.

The first question, the nature of the default——

The Court: Pardon me just a moment. You asked for this data?

Mr. McCall: Yes, sir. [295]

The Court: And you do not have it? Those pencil notations?

Mr. McPharlin: As I understand it, yesterday Mr. Parks made reference to personal pencilled notations at the time of his telephone conversation with Mr. McCall. Last night I went through all my files—I have numerous files of Radkovich Company—together with Mr. Parks, and I was unable to locate those pencilled notations.

Mr. McCall: Is it possible for the cross-claimant, then, against Glens Falls to supply the information from any source?

Mr. McPharlin: Oh, it is just a matter of an issue in the lawsuit, Mr. McCall.

The Court: You asked for certain information in the letter, and the witness stated that he gave that verbally over the phone and he made a pencilled notation of it.

Mr. McCall: Yes.

The Court: Now it is claimed by Radkovich that your questions have been answered in some other manner by way of letter. What letter is this, now?

Mr. McPharlin: There is a letter in the exhibits that have been introduced, your Honor, which is a letter dated July 8th from Wm. Radkovich to E. B. Woolley, a carbon copy to Glens Falls Indemnity Company, and there is attached thereto the return receipt of the post office department showing it was received by E. B. Woolley and signed by B. L. [296] Boggs; that it was received by the Glens Falls Indemnity Company, signed by what appears to be the name of Angelo Woods.

The Court: That is what exhibit, attached to what exhibit?

Mr. McPharlin: That is attached to Radkovich's Exhibit F, and is the next to the last letter in the file.

In addition to that letter to the Glens Falls Indemnity Company there is also a subsequent letter of July 26, 1948, addressed to E. B. Woolley, with also a copy sent to the Glens Falls Indemnity Company.

Mr. McCall: As I understand it, this counsel for Radkovich Company states that those letters he has just referred to is the reply to the letter of June 11th which is the defendant surety company's Exhibit 8 here. If that is his statement, then anything else would be argumentative.

May it be stipulated that if I were sworn as a witness, I would state that I never had the conversation with Mr. Parks that I mentioned yesterday and have never received a letter giving the information requested in Defendant's Exhibit 8, dated June 11, 1948?

Mr. McPharlin: I will stipulate that if you were sworn as a witness you would testify that you have not had that telephone conversation. But in reference to the letter, I think, Mr. McCall, in the ordinary course of events that letter was forwarded to you. Do you want to testify that that letter has never been forwarded to you by the Glens Falls?

Mr. McCall: I will testify that I have never received a letter giving the information requested

in my letter addressed to Radkovich Company June 11, 1948.

Mr. McPharlin: I won't stipulate to that, Mr. McCall, because I believe we are quibbling over terms now.

The Court: A little louder, please.

Mr. McPharlin: I won't stipulate to that. I believe we are quibbling over terms now, your Honor.

Mr. McCall: I did not understand what counsel said he would not stipulate to.

Mr. McPharlin: I will not stipulate that you have never received——

Mr. McCall: No; that is not the question. My question is: Will it be stipulated that if I were sworn as a witness and took the stand, that I would testify that I had never received the answer to this letter of June the 11th which I wrote in behalf of Glens Falls, and that I have never received the information in reply to that letter on the telephone or by letter? That is what I would testify to if I took the stand.

Mr. McPharlin: Oh, then I will agree that you would so testify, if you say so, Mr. McCall.

Mr. McCall: That is all.

Mr. Benedict: That is all, your Honor.

Mr. McPharlin: I would like to call Wm. Radkovich for one [298] question in rebuttal, your Honor.

WM. RADKOVICH

recalled as a witness on behalf of defendants, cross-claimants, and cross-defendants in rebuttal, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McPharlin): Mr. Radkovich, did you at any time prior to July 30, 1948, the date of this subcontract, have any discussion with Mr. Woolley with reference to the chimes question on his subcontract? A. No; I did not.

Mr. McPharlin: No further questions.

Mr. Benedict: No questions.

Mr. McCall: One more question, may it please the Court. Will the Court just excuse me a second?

Cross Examination

Q. (By Mr. McCall): Mr. Radkovich, at the time you state that you loaned 4,000 to Mr. Woolley did you notify the Glens Falls of that incident?

A. I didn't loan it to him.

Mr. McPharlin: Just a moment, I will object, your Honor, as not within the scope of cross examination. The direct examination has been directed to one point. [299]

The Court: I think there was some testimony along that line before.

Mr. McCall: I think there was. I just wanted to be sure and get it in there, if it is not in there.

The Court: I think the witness stated or somebody stated here.

Mr. McCall: Then, may I ask if the deposition

of Mr. Radkovich has been properly executed and returned to the Court?

Mr. McPharlin: Yes; it has. I am glad you reminded me, because I have not put in Mr. Woolley's.

Mr. McCall: Would you like to introduce that into evidence, Mr. McPharlin?

Mr. McPharlin: Yes; I would.

Mr. McCall: I have no objection.

The Court: The entire deposition?

Mr. McCall: Mr. Radkovich's deposition, is that what I understand?

Mr. McPharlin: The original deposition of Mr. Woolley, I understand, has not been filed, and I believe it should be filed, your Honor.

The Clerk: Ordered filed, your Honor.

The Court: It may be filed. What do you intend to have done with it? Is there some portion of the testimony to which you wish to refer?

Mr. McPharlin: We have already referred in the testimony [300] to Mr. Woolley's deposition.

The Court: Yes.

Mr. McPharlin: And we have gone into it, so I believe it should be in evidence, your Honor.

The Court: In certain respects as to those matters.

Mr. McPharlin: Yes.

The Court: Any objection to that?

Mr. McCall: No objection from Glens Falls.

The Clerk: Your Honor, am I to understand that this deposition is also to be marked as an exhibit, in addition to being filed?

The Court: I do not know.

Mr. Benedict: It is only being admitted, as I understand it, for the purpose of the portions referred to. Of course, those are already in the record when they were read by Mr. McPharlin. Whatever he wants to do, though.

The Court: In other words, you want this filed so it will be on file?

Mr. McPharlin: Yes; I believe it should be on file with the records, your Honor.

The Court: In order that you might refer to those matters concerning which you have inquired, and nothing else in the deposition, is that correct?

Mr. McPharlin: Yes, your Honor.

The Court: Is that the understanding? [301]

Mr. Benedict: That is my understanding of what he is offering it for; yes. That is all ight. I have no objection to that.

The Court: Both portions of it may be received for that purpose into evidence. Is that what you want?

Mr. McPharlin: Yes, your Honor.

Mr. McCall: Did I understand that counsel for Radkovich Company was going to introduce into evidence his deposition?

Mr. McPharlin: No. It was Woolley's deposition that I had used. I have made no use of Radkovich's.

Mr. McCall: Has Mr. Radkovich's deposition, may I inquire, been properly returned and filed?

Mr. McPharlin: No. I have it here. It was been verified and executed or signed by Mr. Radkovich.

Mr. McCall: Well, isn't it proper that it be filed with the Court?

Mr. McPharlin: Yes. Do you wish it filed with the Court?

Mr. McCall: Yes, please. If that is agreeable with the Court?

The Court: That should be filed the same as the other deposition.

Mr. McCall: Yes.

The Court: As part of the files.

Mr. McCall: As part of the file. I am a little uncertain——

The Court: In other words, the parties themselves have [302] appeared here as witnesses and testified. You are not attempting to duplicate that testimony, but you are merely emphasizing certain portions of that deposition or both depositions to which you have referred in your questioning and answering.

Mr. McCall: I think it is proper in a case of this kind, if the counsel stipulate, that it might be read by the Court with the other evidence.

The Court: If you wish to do that, then it might be received for that purpose, if that is what you want.

Mr. McCall: I would stipulate that both the depositions may be read by the Court along with other evidence.

Mr. McPharlin: I will accept the stipulation, your Honor.

The Court: I don't know, now. I do not want to have too much confusion here. I have troubles

enough to go over the testimony in this case.

Mr. McCall: They are short, your Honor.

The Court: All right.

The Clerk: I am merely filing these two depositions, your Honor. I am not giving them exhibit numbers.

The Court: The stipulation is now that both of these depositions be filed and that they may be read by the Court in connection with all the other evidence.

Mr. McCall: That is right.

Mr. Benedict: That is correct, your Honor. [303]

The Court: Anything further?

Mr. McCall: There is nothing further. We were just wondering if this was going to be submitted on briefs, or if it was just going to be submitted.

The Court: I was waiting for you gentlemen to conclude your evidence. If you are through now, we can discuss these other items. Has everybody rested now?

Mr. Benedict: We have, your Honor.

Mr. McPharlin: Yes, your Honor.

Mr. McCall: There is nothing further. Yes; the cross-defendant Glens Falls Indemnity Company, the surety for the subcontractor, also rests.

The Court: There is a mass of documentary evidence which requires reading and digesting in connection with the evidence. Do you gentlemen intend to have the evidence written up?

Mr. McPharlin: How do you mean, your Honor, written up?

The Court: A transcript.

Mr. McCall: I would say not, your Honor.

Mr. McPharlin: No.

Mr. McCall: I think the Court has all the notes that are necessary, and we have our points and authorities in the hands of the Court. I would not think it would be necessary to have the evidence written up. However, if the Court should want the advantage of that, I will be glad to pay my part.

The Court: I have taken notes but, of course, the notes [304] are not as complete as they might be. I would have taken more elaborate notes had it occurred to me that in connection with some of these recitals in the contract and specifications and in the correspondence it might be necessary and advisable to see just what the testimony is in that regard.

It would be of assistance to the Court if I had the transcript, if you gentlemen do not object.

Mr. McPharlin: Excuse me. Was the Court making reference to whether or not we would request a transcript of the reporter?

The Court: Yes.

Mr. McPharlin: Yes. We, on behalf of my client, would be very happy to request a transcript to make it available to the Court.

The Court: There are mixed questions of law and fact in this case, and insurance policies and the contracts and plans and specifications and testimony relating to every phase of these negotiations. I would feel a little more secure if I had a transcript before me. Of course, my notes will assist me to find the places I am looking for so I can

consider the evidence in connection with that.

Mr. McCall: I think it is liberal of counsel offering to pay for that.

The Court: Well, that is a matter for them.

Mr. McCall: We will be glad to help him out.

The Court: I would like briefs filed, and then after I have read and digested everything, I may or may not want oral argument, depending on circumstances. Let us say 10 or 15 days on a side.

Mr. Benedict: I have this suggestion to make, your Honor: In view of the fact that the transcript will be written up, that the time for filing briefs start running from the time we have that transcript, so then we will be able to refer probably to the transcript.

The Court: Yes; you can make your argument after you have your transcript and give me a brief. You just use your own judgment as to what you want to set out, in view of the fact that we will have a transcript.

Mr. Benedict: That is right. I think 10, 10 and 5, commencing from the time the transcript is ready would be ample.

Mr. McPharlin: That would be satisfactory.

Mr. Benedict: Would you open, then?

Mr. McPharlin: Yes.

Mr. McCall: If one of us finds ourself in a position of being in a long trial some place, is there any easy way that we can extend that time?

The Court: Oh, we are never exacting in those matters. Counsel ought to have time enough to present what they wish.

Mr. McCall: I imagine, then, it would be proper in that [306] condition that the counsel would stipulate to that and then submit it to the Court for approval. Would that be satisfactory?

The Court: Yes. If you gentlemen agree among yourselves, you do not need to do any more than submit the stipulation to me and I will approve it. Otherwise, if you have any trouble along those lines, let me know.

Mr. McCall: Then after we have this transcript and draw our briefs, would the briefs be in the regular form of a brief or points and authorities?

The Court: Make your argument, if you wish, in the brief, and set out your points and authorities, because that is all that I may need. I may not require any oral argument after I read them.

Mr. McCall: Yes. Then if the Court is satisfied after it gets the points and authorities and transcript, next will follow the judgment of the Court without any oral argument.

The Court: If the Court is satisfied, you will be so notified. But I will set a date for further proceedings in this case. We may or may not have further proceedings, depending on how it looks to me after I have finished reading your briefs and your arguments.

Mr. McCall: Yes, your Honor. My point is this: That in the event judgment is handed down without oral argument or anything further after the briefs, is it in order now and [307] may it be stipulated that judgment for anyone be stayed until 10 days

after the determination of a motion for a new trial, if one is made promptly?

The Court: You will have ample time. I am going to set a date now. After this time shall have expired for the filing of these briefs, I will set a date for further proceedings or argument, and at that time I may render a decision or may not, and I may have oral argument or I may not, but the probability is that I shall have digested your briefs and probably will be ready for pronouncement of decision. And then following that, of course, someone will be authorized or directed to prepare findings and judgment, and that may take a little time before those are settled. Those matters sometimes require discussion before findings are finally made.

You will have ample time to have execution stayed, whoever may be in that position.

Is 10, 10, and 5 enough, now? There are three parties here, aren't there? One party is out; that will be Westinghouse. They do not need to submit anything. So you will open, Mr. McPharlin?

Mr. McPharlin: Yes; I will submit the opening brief, your Honor.

The Court: 10 days after you have been furnished—

Mr. McPharlin: With the reporter's transcript here. [308]

The Court: —with the reporter's transcript. Then the other side, both the Glens Falls and Woolley, will present theirs, is that it?

Mr. Benedict: That is right. We can put ours in, but separate briefs, at the same time.

The Court: That is right. Then you will have 5 days to respond.

Mr. McPharlin: Yes, your Honor.

The Court: Where will that take us to? Of course, I do not know now exactly how long the reporter is going to be. Let us say it will take two weeks. Today is May the 19th and two weeks from today will give us until June the 2nd. Then if counsel are going to take 25 days, that will take us to June 27th when the last briefs should be in. I will be on a vacation in July, so I won't be able to give this any attention until August. We can set a date in August unless you gentlemen take your vacations in August.

Let us find a date in August, and I will be up here for that purpose so you won't have to come to San Diego. I would rather make it on, say, Tuesday, August the 15th, or Wednesday, August the 16th. I think I have to be here, anyhow, at that time. Is that agreeable?

Mr. McCall: Either one, your Honor.

Mr. Benedict: Either date.

The Court: Say Wednesday, August 16th. [309]

[Endorsed]: Filed October 30, 1952.

[Title of District Court and Cause.]

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Los Angeles, Calif., January 26, 1951

Honorable Jacob Weinberger, Judge Presiding.

Appearances: Glen Behymer, appearing on behalf of the plaintiff. Anderson, McPharlin & Connors, by Eldon V. McPharlin, appearing on behalf of Wm. Radkovich Company, Inc., and its sureties. John E. McCall, appearing on behalf of Glens Fall Indemnity Company. Frank M. Benedict, appearing on behalf of E. B. Woolley.

GEORGE B. ALLISON

called as a witness by and on behalf of the Court, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: George B. Allison.

The Court: I am going to ask Mr. McPharlin to inquire of Mr. Allison, as to his qualifications, or, if counsel prefer, you may cover it by stipulation. I assume that Mr. Allison is the Court's witness.

Mr. McPharlin: That is right.

Mr. Behymer: We would stipulate to Mr. Allison's qualifications.

The Court: The Court is interested in knowing the type of construction with which the witness is familiar and has had experience as an architect.

(Testimony of George B. Allison.)

Also, including, of course, any government construction, as we are concerned here with that phase of the case.

Mr. McPharlin: I will question the witness briefly as to his past experience.

The Court: If you will, please. Cover, also, whether or not the witness has drawn any plans, specifications for government construction, and if so, what the projects were and under whose auspices the work was done, that is, which department of the government. I would like to have the record complete on that subject.

Direct Examination

Q. (By Mr. McPharlin): Mr. Allison, what is your business or occupation? A. Architect.

Q. You are a licensed architect in the State of California? A. Yes, sir.

Q. Are you a member of the American Institute of Architects? A. Yes, sir.

Q. Do you hold a college degree in architecture?

A. Yes.

Q. From what school?

A. University of Pennsylvania.

Q. For how long a period of time have you been a licensed architect? A. Since 1934.

Q. You have been engaged in the profession of an architect since that time? A. Yes.

Q. You are a member or a partner of a firm, are you, Mr. Allison? A. That is right.

Q. What is the name of that firm?

(Testimony of George B. Allison.)

A. Allison & Rible.

Q. Do you specialize in any type of work or architecture? A. No, sir.

Q. Generally speaking, what type of architecture or work have you done the most of?

A. Our practice embraces a general field of construction, exclusive of residential. We have done a number of institutional buildings for educational institutions. Do you wish to have those enumerated?

Q. Let me ask, first: Have you done any United States Government work?

A. At Allison & Rible we have not.

Q. Have you individually at any time?

A. Prior to the formation of our partnership, Mr. Rible and I and another firm executed the architectural work for the Civil and Army Housing for the Victorville Base Airport.

Q. What type of a project was that at the Victorville Base?

A. It consisted of about thirty units for residences, of employees.

Q. Was that under the United States Army or the Navy? A. Army Engineers.

Q. Under the Army Engineers? A. Yes.

Q. Have you had any other government or United States Government projects, other than that you have worked on?

A. Not as Allison & Rible.

Q. Have you as an individual?

A. Prior to that, Mr. Rible and I were associated on a project for the Army Engineers at

(Testimony of George B. Allison.)

Palm Springs, at Torrey General Hospital. Mr. Rible was the architect and I was his associate.

Q. Are there any other United States Government projects, other than those two, on which you have worked? A. No.

Q. On those two government projects you have referred to, were the plans and specifications prepared by you or under your direction?

A. Yes.

Q. In the preparation of those plans and specifications was there electrical work involved?

A. Yes. Let me qualify your previous statement, in that the work on the Torrey General Hospital was prepared under the direction of Mr. Rible, who was the architect for the work. I was his associate.

Q. On the Victorville job, were those plans and specifications prepared under your direction?

A. They were.

Q. In those units at Victorville, I assume there was electrical work, also? A. That is right.

Q. In preparing the plans and specifications, insofar as the electrical work was concerned, on the Victorville project, was that prepared by you or do you call in an electrical specialist, or what is the procedure on that, Mr. Allison?

A. An electrical engineer was employed by our group, who prepared those particular drawings; consulting electrical engineer is the proper term.

Q. As I understand it, you, as the architect on the over-all project, would employ an electrical

(Testimony of George B. Allison.)

engineer, who would prepare the electrical drawings or maps? A. That is correct.

Q. Now, insofar as specifications for the electrical work would be concerned, who would those be prepared by?

A. They are likewise prepared by the consulting electrical engineer, and modified as might be required, to conform with the balance of the specifications; the entire specification being supervised by our office.

Q. In your profession as an architect on large projects like that, is it the custom for the architect to call in specialists or technical engineers to prepare the plans and specifications for particular trades, like plumbing, electrical and so forth? Is that the way it is customarily handled?

A. It is done in a number of offices in that way. In a few offices in Los Angeles these specialists or experts are employed by the architect and on his payroll, rather than as independent consulting engineers.

Q. They either have a specialist in their office or they call in a specialist? A. That is right.

Q. Insofar as you are personally concerned, Mr. Allison, are you familiar with, shall we say, the details of electrical plans and specifications?

A. To some extent, yes. To some extent, no. The familiarity of an architect is, I would say, limited.

The Court: That is to say, the lighting and fixtures and the wiring, that is all included within the category of the expert?

(Testimony of George B. Allison.)

The Witness: Yes, sir.

The Court: You relied on him entirely for that information?

The Witness: Not entirely. For instance,—May I speak for a moment, sir?

The Court: Yes. Go ahead.

The Witness: For instance, let us take this courtroom here, the architect, no doubt, selected the type of illumination that was planned and built in this courtroom. The electrical engineer would, doubtless, take the general intent of what was desired and work out the details and the technical data required to accomplish what was intended.

The Court: That is, all the planning of the wiring and conduit and everything relating to the job was his job?

The Witness: That is right. The architect frequently selects the fixtures, selects the actual fixtures, and he knows the type of work that will be required or the class of project will require certain types of fixtures which, in general, he supervises and selects.

The Court: And sometimes he designs those fixtures?

The Witness: Yes, in some cases we have actually designed fixtures.

The Court: I think that covers that situation pretty well.

Mr. McPharlin: I had one other question.

Q. (By Mr. McPharlin): On a federal project like that, for example, your Victorville project, did

(Testimony of George B. Allison.)

you work frequently with the United States Engineers or any of their technical men? A. Yes.

Q. Do they have architects or these technical experts in their office?

A. They have a number of employees. The basis of their qualifications for employment are unknown to me. These employees, during the recent war, were trusted with producing a vast amount of plans and specifications. They are usually under terrific pressure and the professional people employed by the Corps of Engineers, as a result, dealt with these employees once the original arrangements had been concluded.

Q. Were you under their direction? Were they under your direction, or what was the relationship between you and the Office of the United States Engineers, in reference to the plans and specifications?

A. We were under their direction.

The Court: Generally, the government has experts who design, who make out layouts for wiring and all that, is that right?

The Witness: I would say no, sir. In the case of the project to which I referred, the wiring layout was made by our office. The selection of fixtures was carefully reviewed with the government experts and so noted on the drawings.

The Court: Now, I imagine you want to proceed with the other matters concerning which you wish to inquire of Mr. Allison.

Who wants to inquire first?

(Testimony of George B. Allison.)

Mr. McPharlin: Shall we proceed with the written interrogatories we previously submitted?

The Court: I think so.

Q. (By Mr. McPharlin): Mr. Allison, written interrogatories have previously been submitted to you by the parties. Have you had an opportunity to go over and review those? A. Yes.

Q. In reference to the written interrogatories proposed by cross defendant Radkovich and his Sureties, the first question was:

“Are there standard symbols recognized in the building trade for lighting outlets? A. Yes.

Q. “Are the symbols shown on Sheet 6 of the Plans such standard symbols?”

A. I think that question should be best answered, for a matter of Court record, by an electrical engineer. In our experience they do not in all cases conform with the practice of our office.

Q. Isn't there in your profession as an architect, or in the electrical business, a standard set of symbols, Mr. Allison?

A. Yes. That was the first question.

Q. The symbols that are on the plans here in question, aren't they symbols contained in that standard set of symbols?

A. They do not in all respects conform with our own practice, no, sir.

Q. Well, in your practice do you follow the standard set of symbols? A. Yes.

Q. Now, on the plans here, I believe there are five or six or perhaps more symbols that are shown

(Testimony of George B. Allison.)

on the plans. Do those symbols appear in the set of standard symbols?

A. I think that the answer to that should, for a matter of Court record, be best handled by an electrical engineer.

Q. The next question, Mr. Allison, "With the amperage predetermined as shown on the wiring diagrams on Sheet 6, would it be necessary to use the descriptive words that follow the symbols for wiring the outlet?"

A. I think that question should be asked an electrical engineer.

Q. The next question is, "Do the words 'wall bracket-switch integral' designate a type of fixture?"

A. My answer would be that it does not designate, but it generalizes it as to type. It is a general classification of type.

Q. The next question, "If so, what type of fixture does it mean?"

A. The word "fixture" does not occur in the question—or in the electrical schedule. However, my opinion would be that it would designate a wall bracket fixture. An answer for the record should come from an electrical engineer.

Q. "Does Sheet 5 of the Plans show a fluorescent fixture in the drawings?" A. Yes.

Q. "Are the locations and designations of the fluorescent fixtures shown on Sheet 6?"

A. Yes.

Q. "From Sheet 6 only, can you determine the

(Testimony of George B. Allison.)

location where the electric panel board was to be installed in the building, or is it necessary to refer to Sheet 1 also of the Plans?"

A. It is necessary to refer to Sheet 1.

Q. "Isn't it true that the letters 'N.I.C.' as used on plans mean 'not included in contract'?"

A. Yes, that is true.

Q. "Isn't it true that on Sheet 1 of the Plans after the descriptive words 'electric range' and 'electric refrigerator,' there are the letters 'N.I.C.'?"

A. Yes.

Q. "Isn't it true that after the descriptive words for light fixtures on Sheet 6, there are not the letters 'N.I.C.,' nor any other indication of their exclusion?"

The Witness: Your Honor, I would like to qualify my reply by this statement: That I question whether on Sheet 6 there are descriptive words for light fixtures. There is a list of symbols called "electrical." It is true that there are no letters "N.I.C." behind the symbols.

Q. (By Mr. McPharlin): Following the symbols there are further descriptive words, are there not, Mr. Allison?

A. The descriptive words on Sheet 6——

Q. Yes, following the symbols.

A. ——are "ceiling outlet, fluorescent, wall bracket-switch integral, duplex receptacle, electric water heater, electric range and motor."

Q. After those words they do not have the letters "N.I.C.," do they?

A. That is right.

(Testimony of George B. Allison.)

Q. "Referring to Sheet 6 of the Plans and the descriptive words which follow the symbols, which of those designate equipment and which fixtures?"

A. I would say beyond any doubt the water heater, range and motor designate equipment. As to the designation of fixtures, I see no mention of the word "fixtures," and I think an answer for the record should come from an electrical engineer.

Q. "Are there standard type numbers for fixtures, or does each manufacturer use his own model or trade designation?"

A. The answer should come from an electrical engineer.

Q. In your experience as an architect, do you know of any standard type number that applies throughout the electrical business to designate a particular fixture? A. No, sir.

Q. "If there are no standard type numbers, is it not customary for the contractor to submit a list of fixtures for approval as required in Section 15-03(b), (c) of the Electrical Specifications?"

A. I think an electrical engineer should answer the question.

Q. The next question is, "Is it not true that the number or model would be furnished by the contractor in his submitted list for approval, which number would be that of the manufacturer selected by him?"

A. Lists of fixtures submitted by contractors are always reviewed by our consulting electrical engineers. I think for the record this question should

(Testimony of George B. Allison.)

be answered by an electrical engineer.

Q. "Does not the wiring diagram on Sheet 6 of the Plans require chimes circuits?"

A. From my limited knowledge and familiarity with this branch of work, I would say yes, it does.

Q. "Is it not true that Paragraph 15-20 of the Electrical Specifications indicates that there shall be installed push buttons for the signalling system at both the rear entrance and front entrance?"

A. At this point would it be proper to read that paragraph?

The Court: Yes.

The Witness: "The contractor shall"——

The Court: A matter of that construction would be if it has reference to other parts of the contract.

The Witness: The paragraph is headed "15-20 Signaling System (For Quarters)."

The Court: Yes, you may read it.

The Witness: "15-20 Signaling System (For Quarters). The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes, as hereinafter described and where indicated on the drawings. The Contractor shall install dual-purpose, 2-toned, bar-type musical chimes. Tones shall be amplified by two (2) short resonating tubes. Tone bars and operating mechanism for each set of chimes shall be completely concealed by an approved ornamental housing. The signal for the rear entrance shall be distinct from that of the front entrance. Push buttons shall be of the flush type with nickel-plated

(Testimony of George B. Allison.)

trims and 5/8-inch flat pearl centers. Chimes shall be operated by means of an approved 8- to 10-volt bell ringing transformer flush mounted in the service room and connected to the nearest lighting outlet. Signal-system wiring shall be not less than No. 16 gage and shall be installed in conduit only where passing through masonry. No splices shall be made except where they will be accessible upon completion of the building.”

Q. (By Mr. McPharlin): Mr. Allison, on a government contract, isn't it customary for the government, if it is going to furnish any of the materials or equipment, to specifically designate what materials or equipment they will furnish?

Mr. Benedict: I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness on a matter not related to the issue before the Court.

The Court: I think if he were qualified to answer, he might state whether or not there was any custom in that particular field. But I do not think he relies on his own experience. The witness stated he would call in electrical engineers to work out that phase of the work.

Do you feel you can answer that question? I do not mean this particular question, but is there a custom in the trade?

The Witness: I would say that on government—The question had to do with government contracts, and I don't feel I am qualified to speak as to the custom in government contracts. Is that the

(Testimony of George B. Allison.)

correct question? May we have the question read back, sir, please?

The Court: Are you satisfied with that answer?

Mr. McPharlin: Yes. I will go on, your Honor.

Q. (By Mr. McPharlin): In your profession as an architect or in the general building construction business, when a contract is made for the construction of a building for residential purposes, isn't it customary that lighting fixtures are installed by the contractor?

Mr. Benedict: Just a minute. I object to that on the ground the witness testified that his knowledge in this particular line has been obtained other than in residential construction.

The Court: Now, are we within the scope of the questions that were to be asked?

Mr. McPharlin: Those are not——

Mr. Benedict: He is asking some other questions.

Mr. McPharlin: ——in the written interrogatories. I have enlarged on the written interrogatories in these last two questions.

The Court: I am wondering if that is not a matter of cross examination. You have propounded certain questions in your draft and the other side has likewise.

Mr. McPharlin: Shall we confine ourselves to those written interrogatories?

The Court: There seems to be an objection.

Mr. Benedict: My understanding, if the Court please, is we were going to confine ourselves. We

(Testimony of George B. Allison.)

have let Mr. McPharlin ask several other questions. I understood that was the purpose of this hearing, to confine ourselves to these particular interrogatories. That is what we propose to do.

The Court: I think that was the purpose of the routine we would follow, in propounding certain questions and getting the answers.

Mr. Benedict: That is right, your Honor.

The Court: Of course, that does not prohibit or restrict the rights of either side to cross examine.

Mr. Benedict: No; that is right.

The Court: I think we had better stay with our plan.

Q. (By Mr. McPharlin): The next question: "Considering the Plans, Specifications, Contract Documents and Exhibits which have been furnished you, is the Electrical Subcontractor, in your opinion, required to furnish and install the fixtures?"

Mr. Benedict: I object to that, if the Court please, as calling for a conclusion of the witness on the very matter that is the Court's province to decide.

The Court: Well, he may answer, I think, if he bases his answer on what appears in the Plans and Specifications.

Can you answer that?

The Witness: I would say, in reply, that is the most critical question that has been propounded. In view of my earlier limitation of my own testimony here, a question of such importance should

(Testimony of George B. Allison.)

certainly be answered by our consulting electrical engineer, rather than myself.

Q. (By Mr. McPharlin): That would be your response then to the following question, which is almost identical?

A. No, not the following question.

Q. The following question is this, and I will read this to you, Mr. Allison: "Considering the Electrical Specifications, Plans, Contract Documents and other Exhibits furnished you, in your opinion is the Subcontractor required to furnish and install a low voltage signalling system consisting of push buttons and mechanical door chimes?"

A. The paragraph inserted in the testimony, 15-20, clearly calls for this with one qualifying clause in that paragraph; "where indicated on the drawing" is the qualifying clause.

In our interpretation, on a normal project we would require the contractor to include a signalling system because of the great detail which has been given the description of the signalling system in the Specifications. Technically, in our opinion, the contractor would have an argument because there is a question of designation on the drawings.

But the clear intent is that there shall be a "Signalling System (For Quarters)," as captioned under 15-20.

Mr. McPharlin: Those are all of my interrogatories, your Honor.

The Court: Is there any cross examination?

(Testimony of George B. Allison.)

Mr. Benedict: Just a few questions, if the Court please.

Cross Examination

Q. (By Mr. Benedict): Mr. Allison, referring to Sheet 5 of the Plans before you, I believe you have testified that they indicate fluorescent fixtures.

A. It is four 36-inch fluorescent tubes.

Q. Does that indicate the fixtures or simply the type of outlet?

A. I think a great deal of this discussion has to do with the word "fixture." I would say that clearly four 36-inch fluorescent tubes are required under the contract. The housing for those tubes and the manner of attaching them to the outlet is a matter for an electrical engineer to answer.

Q. In other words, the designation there merely calls for the number of fluorescent tubes that are to be inserted in a particular fluorescent fixture, which is not designated, isn't that true?

A. The drawings show a housing for those tubes; some bracket to hold up the tubes shown here in the drawing.

Q. It shows some kind of a housing?

A. That is right.

Q. It doesn't show any designation as to what particular type housing is to be used?

A. I fail to find any specific reference to that in the document.

Q. Isn't it true that there are many different

(Testimony of George B. Allison.)

types of housing that could be used for a tube, a fluorescent fixture?

A. The word "many" might be qualified, or several.

Q. By the term "housing," is that synonymous with "fixture" or not?

A. That question should be answered by an electrical engineer.

Q. I was wondering in what sense you used it when you referred to the term "housing."

A. My reference had to do with Section A on Sheet 5, which shows some support for the end of the fluorescent tubes here. Here is a fluorescent tube.

The Court: Will you read that portion to which you refer?

The Witness: Your Honor, on Section A of Sheet 5, a three-quarter-inch plywood shelf, I take it, is shown in the hall closet, and a designation of four 36-inch fluorescent tubes are shown on that section, together with some sort of supporting unit, indicating that the fluorescent tubes are held up.

Q. (By Mr. Benedict): Mr. Allison, were you also supplied a small electrical drawing to examine, in addition to what you have here before you, Exhibit Radkovich's H? Were you also given a smaller drawing?

Mr. Benedict: Mr. Clerk, may I have Woolley's Exhibit 5?

The Clerk: I think the witness has it.

The Witness: It is right here.

(Testimony of George B. Allison.)

Mr. Benedict: All right. Yes, I see. I had forgotten. I thought it was a smaller drawing, but it is not. That is the one I meant.

The Witness: That is the same as this first sheet here (indicating).

Q. (By Mr. Benedict): That shows the same detail that you have just testified to, in reference to fluorescent tubes? A. That is on Sheet 5.

Q. But Sheet 6, it does not show that in reference to the fluorescent tubes?

A. Sheet 6 indicates in the subject piece of casework 2(f), fluorescent, and that is the only designation. They are shown, however, clearly connected on a switch and located as A and B in the casework.

Q. Well now, would those designations refer to the type of outlet or not that was to be used?

A. I think the electrical engineer should answer that question.

Q. To the best of your knowledge, that would not indicate any particular fluorescent fixture, would it? A. No, nothing specific.

Mr. Benedict: If the Court please, that concludes my cross examination. I would like to then propound the questions heretofore submitted to the Court on the part of E. B. Woolley.

The Court: Is there anything further so far as the cross examination is concerned?

Mr. McPharlin: No further redirect examination on that, your Honor.

(Testimony of George B. Allison.)

The Court: All right. You may proceed with your questions.

Mr. Benedict: Question No. 1. "What is meant by the term 'Type numbers' in reference to electrical fixtures when used in building plans and specifications?"

The Witness: Your Honor, my answer would be qualified for any court record. I think the answer should come from a consulting electrical engineer, who would prepare such information for our own use.

Mr. Benedict: 2, "Are there any type numbers for electrical fixtures indicated on Woolley's Exhibit 5?"

The Witness: No.

Mr. Benedict: 3, "Are there any symbols on Woolley's Exhibit 5 which refer to the types of outlets that are to be installed?"

The Witness: At this point, your Honor, I would like to ask whether the federal specification referred to in the specifications has reference to outlets, Federal Specification W-O-821-A, under 15-07. And likewise Federal Specification W-O-806 under the same paragraph, whether they have been reviewed in connection with this testimony.

The Court: What page is that?

The Witness: On page 15-4.

The Court: Exhibit number?

The Witness: They would be under Exhibit B. I am not familiar with those Federal Specifications and I doubt if the ordinary electrical engineer

(Testimony of George B. Allison.)

would be, unless he had a copy before him. They are highly specified and since they are included under the Specifications, I should think they might be pertinent to the question.

Mr. Benedict: Well, Mr. Allison, in reference to the question that I just asked, are you able to answer that? "Are there any symbols on Woolley's Exhibit 5 which refer to the types of outlets that are to be installed?"

The Witness: I think the electrical engineer should answer that question.

Mr. Benedict: Well, in view of your answer to Question No. 3, Question No. 4 is inapplicable, so there would be no point in asking it of you.

5, "If your answer to Question 3,——" the same statement would apply to Question No. 5.

The Witness: Yes.

Mr. Benedict: That is all, your Honor.

The Court: Cross examination?

Mr. McPharlin: That is all, your Honor.

The Court: Is there anything further from any of the other parties?

Mr. McCall: Nothing further.

Mr. Benedict: No, your Honor. That is all.

The Court: I suppose you have testified to everything you had in mind, Mr. Allison, in reference—

The Witness: I could make some more general observations which might or might not be appropriate. This is my first appearance as an expert witness.

(Testimony of George B. Allison.)

The Court: If these are your expert opinions, we will be glad to have them for the record, in relation to these questions. That is to say, you want to explain some of your answers or you want to add something to them?

The Witness: I believe that the specific answers to the questions that were advanced by counsel have indicated, from my replies, that they would be most authentically applicable if they were given by a good consulting electrical engineer. In the building trade of today there are so many complex specialties phases of it, which are of a highly specialized nature, it is customary to employ experts in the field.

Our office, together with many offices, retain, on a consulting basis, men who are recognized as specialists in their particular fields.

As to the Army Housing Project first mentioned, I have that set of prints with me, although they aren't a part of this exhibit. That might or might not have any bearing on this case.

The Court: The question I would like to ask you is this: Are you familiar with the subject, that there is a difference in the range in price in fluorescent fixtures, which could be attached to outlets shown to be wired on the plans?

The Witness: Yes. My familiarity with fluorescent fixtures, as with many features of the electrical business, is that there is a very great range in cost and price.

The Court: Also with respect to wall bracket

(Testimony of George B. Allison.)

fixtures, which could be placed on outlets shown, is there a variation there, too?

The Witness: Yes, there would be a tremendous variation. Technically, a wall bracket might be a very simple bedroom wall lamp or it might be a very elaborate type of—my own testimony rather hedged. The word “fixture,” I think you will find the word “fixture” was a little vague in these documents.

The Court: You could say the same for all other lights for which outlets have been provided in the plans?

The Witness: I think so. Under the specifications—let me read Paragraph 15-19, headed “Fixtures. Where type numbers are indicated on the drawings, the contractor shall furnish and install all lighting fixtures in accordance with the applicable details.”

Elsewhere in the documents—I don't recall the exact paragraph—some reference appeared as to a list of fixtures. But I was unable to find such a list.

The Court: Is there anything further, Mr. McPharlin?

Mr. McPharlin: Yes.

Do you recall reading the paragraph that provides that the contractor will submit a list of materials, fixtures and so forth that he intends to use?

The Court: Would that be a matter for this witness to discuss?

Mr. McPharlin: Yes, I believe it would be, your

(Testimony of George B. Allison.)

Honor. He has just been referring to the term "fixtures" as used in those Specifications, and I wanted to call his attention or question him on this other paragraph.

The Witness: May I read that Paragraph 15-03, Sub b, "Materials and Equipment Schedules"?

Mr. McPharlin: Yes, you may read it.

The Court: Yes.

The Witness: "As soon as practicable and within 30 days after the date of award of a contract and before any materials, fixtures, or equipment are purchased, the Contractor shall submit to the Contracting Officer for approval a complete list, in triplicate, of materials, fixtures, and equipment to be incorporated in the work. The list shall include catalog numbers, cuts, diagrams, drawings and such other descriptive data as may be required by the Contracting Officer. No consideration will be given to partial lists submitted from time to time. Approval of materials will be based on manufacturers published ratings. Any materials, fixtures and equipment listed which are not in accordance with the Specification requirements may be rejected."

Mr. McPharlin: Isn't it sometimes customary for an electrical subcontractor to submit lists of materials, including fixtures, which he intends to use, for approval by the owner?

Mr. Benedict: I object to that, if the Court please, as calling for a conclusion, and furthermore, the question, if it is an attempt to prove custom, it is improperly worded, because it states, "Is it

(Testimony of George B. Allison.)

sometimes customary." I don't think you can prove custom by what happens occasionally.

The Court: If he knows there is some custom, he may state generally, if he knows that such a custom exists in that trade.

Or is that within the category of the electrical engineer?

The Witness: Very definitely, I would say, that is a matter for the electrical engineer to reply to.

Mr. McPharlin: You are familiar with the general customs in the building trade, aren't you, Mr. Allison? I don't mean any particular technical item, but generally speaking you are familiar with the customs in the building trade, as to plans and specifications?

The Witness: Insofar as our own practice is concerned, yes.

Mr. McPharlin: Now, ordinarily, when a general contractor is bidding on a contract, a large project, which contains a set of specifications and drawings, and those specifications are divided into sections for different specialized trades, isn't it true that a general contractor just turns that over to the subcontractors in that trade, from whom he is calling for bids, and that a general contractor himself does not attempt to interpret plans and specifications, for example, under the electrical section?

Mr. Benedict: If the Court please, I object to that question as an improper question so far as **this witness** is concerned. I think we are again going to the very question for your Honor to de-

(Testimony of George B. Allison.)

cide. Custom could never prevail over the terminology of an agreement; may or may not be the contract, so far as that is concerned.

The Court: I think that question is objectionable.

Mr. McPharlin: Mr. Allison, have you noticed in the conditions of the prime contract references to what should be done in case of any ambiguity between the plans and specifications?

The Court: There is a provision in the contract. We are all familiar with that, are we not? It is in the Specifications. That is not a matter of an expert opinion. Or am I correct?

Mr. McPharlin: I wanted to follow that up with another question, your Honor. That is why I was calling his attention to it.

The Witness: The general contract, in answer to your question, under Article 15, treats with disputes, and is headed "Disputes."

Mr. McPharlin: Article 2 of the general conditions provides that, "Anything mentioned in the specifications and not shown on drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern."

Does that apply to our situation here, Mr. Allison?

Mr. Benedict: The Court please, that is the very question for the Court to determine.

(Testimony of George B. Allison.)

The Court: The objection is sustained.

Mr. McPharlin: In case of any ambiguity, under one of the technical sections of the Specifications, applying to a particular trade, whose duty would it be to bring that to the attention of the owner, the subcontractor engaged in that trade or the general contractor?

Mr. Benedict: I object to that as calling for a conclusion of the witness. It is all set forth in the agreement there.

The Court: That is all covered by the terms of the contract.

Mr. McPharlin: No further questions.

The Court: Just one more question, Mr. Allison.

In drawing plans you treat the item for electric wiring in a different category from the fixtures?

The Witness: Oh, yes.

The Court: In other words, they are separate items?

The Witness: Yes.

The Court: One has to do with wiring and the other has to do with fixtures?

The Witness: The fixtures, in our practice—in our practice the fixtures are covered in several different ways, but they are always specifically set aside, as contrasted to the outlets, the symbols.

The Court: Yes.

The Witness: We sometimes require an allowance for fixtures, when the cost situation is rather vague at the time the bids are taken. Sometimes fixtures are actually listed in the schedule, that is,

(Testimony of George B. Allison.)

listed in the schedule by actual number and so forth. At other times there is a list of the general sort of fixtures we have in mind, with a provision that the selection of fixtures shall be subject to the approval of the architect.

The Court: Is there anything further?

Mr. McPharlin: No further questions.

Mr. Benedict: No further questions.

The Court: Thank you, Mr. Allison, for your assistance.

The Witness: I was very sorry I couldn't answer all the questions, but in fairness to all concerned, why, my usefulness is rather limited in a rather specialized situation of this kind.

The Court: Yes.

(Witness excused.)

[Endorsed]: Filed Oct. 29, 1952.

[Endorsed]: No. 13606. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Company, a corporation, Appellant, vs. United States of America, at the Relation of and to the Use of Westinghouse Electric Supply Company, Wm. Radkovich Company, Inc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 3, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13606

GLENS FALLS INDEMNITY COMPANY,
a Corporation,

Appellant,

vs.

WM. RADKOVICH COMPANY, INC.,
a Corporation, et al.,

Appellees.

POINTS ON WHICH APPELLANT INTENDS
TO RELY ON APPEAL

Pursuant to the Rules of the United States Court of Appeals for the Ninth Circuit, Rule 19, appellant

herein makes a concise statement of the points on which it intends to rely and designates the record which is material to the consideration of the appeal.

The appellant is Glens Falls Indemnity Company, usually hereinafter referred to as appellant. Appellant was a cross-defendant in a cross-claim filed by Wm. Radkovich Company, Inc. and its sureties, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation. The said appellee sureties are hereinafter referred to as sureties for Wm. Radkovich Company, Inc. and collectively said appellees above named are referred to as cross-claimants. Wm. Radkovich Company, Inc. is hereinafter referred to by name or when more convenient as obligee of the surety bonds involved in the action. E. B. Woolley was the other cross-defendant with appellant on the cross-claim filed by Wm. Radkovich Company, Inc. and is sometimes hereinafter referred to as principal on the said surety bonds.

Points on Which Appellant Intends to Rely

1. The cross-claim of cross-complainants fails to state a claim against appellant upon which relief can be granted in the following particulars:

(A) Said cross-claimants failed to make any allegations showing liability of appellant and further failed to allege either compliance by Wm. Radkovich Company, Inc., or an excuse for non-compliance,

with the express conditions precedent to liability of appellant on said Performance Bond.

(B) Said cross-claimants failed to make any allegations showing liability of appellant and particularly failed to allege that the obligee (Wm. Radkovich Company, Inc.) named in the Payment Bond suffered loss or damage while the said bond only obligated the appellant to "indemnify and hold obligee free and harmless from and against all loss and damage."

2. The Judgment against appellant cannot be predicated upon appellant's Performance Bond for the following reasons:

(A) The trial court found in Findings XIII and XVI that E. B. Woolley, the principal on said bond, fully completed the work specified in the subcontract in question between Wm. Radkovich Company, Inc. and E. B. Woolley upon completion of which the obligation of appellant under the Performance Bond was to cease. Therefore, these Findings do not support Conclusion of Law II or the Judgment against appellant insofar as said Conclusion of Law and Judgment are based upon the Performance Bond.

(B) Evidence was introduced upon the material issue of fact raised by appellant at the trial that the obligee, Wm. Radkovich Company, Inc., failed to comply with the express conditions precedent contained in said Performance Bond and the court erred in failing to make findings upon the material issues of fact raised by the said express conditions precedent which are express conditions precedent to liability of appellant. Conclusion of Law II and

Judgment against appellant are therefore not supported by the Findings.

(a) Evidence was introduced on the issue of compliance by the obligee with the express condition precedent in said bond which reads, "The said Surety shall be notified in writing of any act on the part of said Principal, or its agents or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Oblige, * * *". The trial court failed to make any finding upon the material issue of fact of whether said condition precedent was complied with in two particulars: First, as to whether any notice was given to appellant when Wm. Radkovich Company, Inc. was advised by the principal, E. B. Woolley, that he was in financial difficulty and, Second, as to whether the giving of notice to appellant some sixty-one days after receiving the claim of Westinghouse Electric Supply Company for the payment of \$43,514.05 for materials supplied to, but not paid for by E. B. Woolley is in compliance with said express condition precedent. In this respect the Findings are lacking on a material issue of fact necessary to support Conclusion of Law II and the Judgment against appellant.

(b) Evidence was introduced in many particulars relative to the performance and failure of performance of the subcontract by Wm. Radkovich Company, Inc. The trial court failed to make any finding as to whether Wm. Radkovich Company, Inc. well and truly performed and fulfilled all of the un-

dertakings, covenants, terms, conditions and agreements of the said subcontract. An affirmative finding of such performance is necessary to sustain Conclusion of Law II and the Judgment against appellant because such performance is an express condition precedent to recovery against appellant upon the Performance Bond.

(C) Said cross-claimants failed to prove a material and substantial element of their claim in that they failed to show that E. B. Woolley had been paid according to the terms of the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley, thus failing to establish performance of express conditions precedent contained in said Performance Bond.

(It affirmatively appears from Finding XVIII that cross-claimants entirely failed to prove compliance with the first express condition precedent to the right to recover against appellant on the Performance Bond which condition is, "The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified." In Finding XVIII, the court found, "That there is no evidence from which the court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which

the court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month." The burden of showing compliance with the subcontract, including payment in accordance with its terms, as an express condition precedent to recovery was on cross-claimants. Conclusion of Law II and the Judgment against appellant are therefore unsupported by the Findings and impeached by Finding XVIII.)

(D) Appellant was exonerated from liability upon said Performance Bond because after the execution of said bond, the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the knowledge or consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any ma-

terials were furnished by E. B. Woolley other than those purchased from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate that there were any “additions to the structures and improvements covered by said contracts.”

The only rationale of the Findings is that the subcontract was altered by the addition of \$8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to “extras” likewise impeaches Conclusion of Law II and the Judgment in that appellant’s bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned. Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are therefore, not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

(E) That portion of Finding XVIII which reads, "That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon

as defenses" is unsupported by the evidence in the following particulars more specifically detailed above:

(a) The cross-claim fails to state a claim against appellant upon which relief can be granted.

(b) The subcontract was materially altered by the parties thereto after the said bond was executed and without the knowledge or consent of appellant.

(c) Payments were made by Wm. Radkovich Company, Inc. to E. B. Woolley before said sums were earned by E. B. Woolley.

(d) Wm. Radkovich Company, Inc. required E. B. Woolley to furnish extra and additional materials and to perform extra and additional work not called for by the subcontract.

3. The Judgment against appellant cannot be predicated upon appellant's Payment Bond for the following reasons:

(A) Wm. Radkovich Company, Inc., the obligee under said Payment Bond has not suffered such loss or damage as appellant is bound to indemnify said obligee against.

(The Payment Bond being a bond of indemnity only, Wm. Radkovich Company, Inc., the obligee named in the Payment Bond, is not entitled to recover against appellant unless he has paid the claim of Westinghouse Electric Supply Company. There is neither allegation nor evidence of such payment and there is no finding upon this issue which is a material issue of fact. Therefore, Conclusion of Law II and the Judgment are unsupported by the Findings.)

(B) Appellant was exonerated from liability upon said Payment Bond because after execution of said bond the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any materials were furnished by E. B. Woolley other than those purchased from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate there were any "additions to the structures and improvements covered by said contracts."

The only rationale of the Findings is that the subcontract was altered by the addition of \$8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event, they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to "extras" likewise impeaches Conclusion of Law II and the Judgment in that appellant's bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned.

Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are, therefore not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

4. The Performance Bond and the Payment Bond should be construed together and the conditions precedent to recovery on the Performance Bond should apply equally to the Payment Bond and all of the points relating to conditions precedent which appellant has specified relative to the Performance Bond apply equally to the Payment Bond.

* * * * *

The parties to this appeal will forthwith submit a stipulation subject to order of court that exhibits

need not be printed but that they may be considered by the court in their original form.

Respectfully submitted,

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[Endorsed]: Filed Nov. 10, 1952. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE PRINTING OF EXHIBITS

Whereas, counsel for the respective parties are of the opinion that reference to exhibits will not be frequently required; and

Whereas, there are numerous detailed exhibits, the printing of which would be an expense out of proportion to the usefulness of such printed documents;

Now, Therefore, it is hereby stipulated by the respective parties to this appeal by and through their respective counsel that subject to order of court the exhibits which are part of the record on

appeal need not be printed and that they may be considered by the court in their original form whenever necessary.

Dated: November 10, 1952.

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So Ordered.

/s/ WILLIAM DENMAN,
Chief Judge,

/s/ WM. HEALY,

/s/ WALTER L. POPE,
United States Circuit Judges

[Endorsed]: Filed Nov. 13, 1952. Paul P. O'Brien,
Clerk.



No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, Wm.
RADKOVICH COMPANY, INC., *et al.*,
Appellees.

Appeal From the United States District Court, Southern
District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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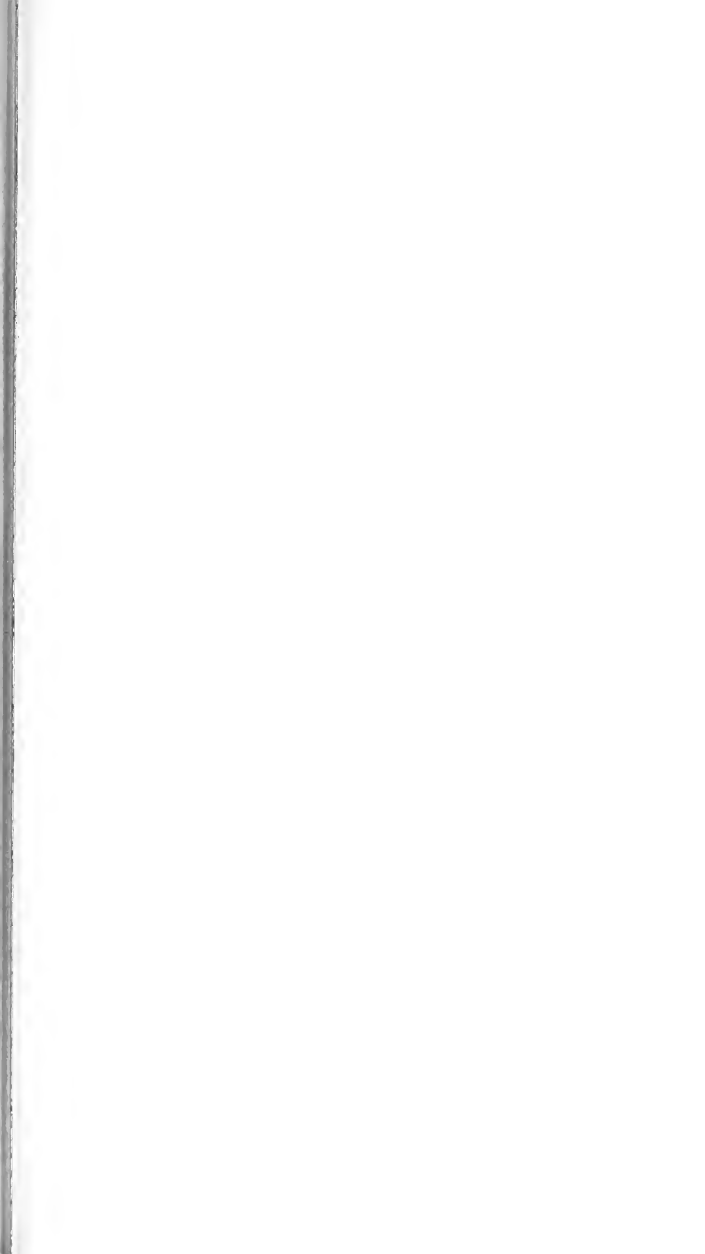
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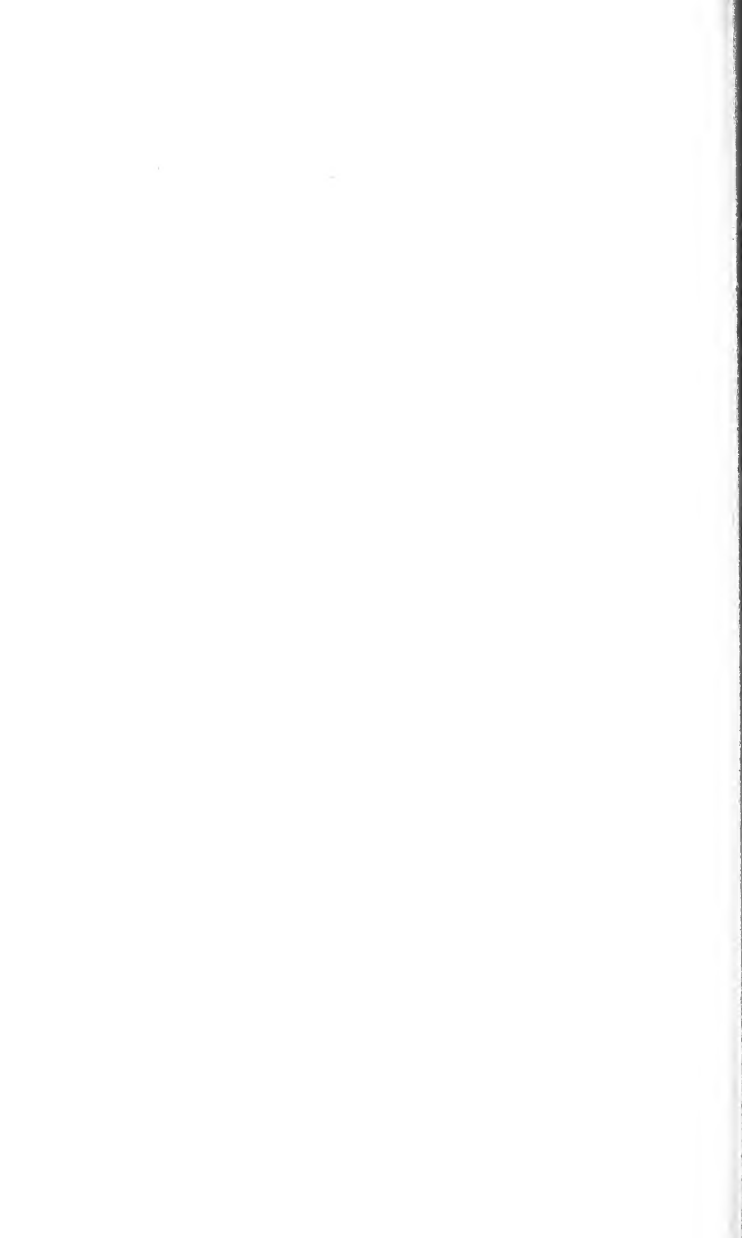
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No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, WM.
RADKOVICH COMPANY, INC., *et al.*,
Appellees.

Appeal From the United States District Court, Southern
District of California, Central Division.

APPELLANT'S OPENING BRIEF.

I.

Statement of the Pleadings.

The pleadings can be best understood by reference to a chart thereof, Appendix page 1. The jurisdictional basis for various pleadings appears hereafter under II of this brief entitled, "Jurisdiction of the District Court and United States Court of Appeals." This portion of the brief is devoted to outline of the pleadings as such.

1. The Complaint of Westinghouse Electric Supply Company.

The action was commenced by the filing of a complaint [R. 3] by Westinghouse Electric Supply Company (hereinafter referred to as Westinghouse), in which the

United States of America appears as a nominal plaintiff as authorized by 40 U. S. C. A. 270b, known as the Miller Act. The complaint alleged that Westinghouse supplied materials to E. B. Woolley, who was a subcontractor for Wm. Radkovich Company, Inc., a prime contractor (hereinafter referred to as Radkovich), employed by the United States of America as owner to construct one hundred houses known as Temporary Family Quarters at Muroc Army Air Field, Muroc, California, and that all of the materials so supplied were used in the construction of said houses.

The defendants named in said action were E. B. Woolley (hereinafter referred to as Woolley), the subcontractor, Radkovich, the prime contractor, and certain sureties for Radkovich, whose names appear on the aforesaid Chart of Pleadings and who will hereinafter be referred to as Radkovich Sureties. All of these defendants answered. Woolley [R. 32] and Radkovich [R. 29] each filed separate answers and Radkovich Sureties [R. 26] collectively filed an answer.

2. The Cross-claim of Radkovich and Radkovich Sureties.

Radkovich and Radkovich Sureties filed a cross-claim [R. 18]. The cross-claim is not based upon federal statute. The cross-claim asserted that if cross-claimants were liable to Westinghouse for the materials supplied to Woolley upon his order and used by him in the performance of his subcontract, then Woolley was liable in like amount to cross-claimants less any amount due from Radkovich to Woolley in payment of amounts earned by Woolley by performance of his subcontract.

The cross-claim also alleged that Glens Falls Indemnity Company (hereinafter referred to as Glens Falls), ex-

ecuted a payment bond thereby binding itself as surety for Woolley unto Radkovich. The original cross-claim was amended to add that Glens Falls also executed a performance bond binding itself as surety for Woolley unto Radkovich. The amendment appears at page 87 of the record, but it is not necessary to refer to the amendment because it was accomplished by substitution of original pages pursuant to authorization and order of the court. Consequently, the cross-claim as printed in the record is complete as amended. The language of the cross-claim as originally presented unamended does not appear in the record.

Cross-defendants Woolley [R. 55] and Glens Falls answered. The answer of Glens Falls [R. 36] was amended [R. 89] at the same time the cross-claim was amended and the amendment to the answer was accomplished by substitution of pages pursuant to authorization and order of court. Consequently, the answer as printed in the record is complete as amended and the language of this answer as originally presented unamended does not appear in the record. However, there is a misprint in the record at page 37, paragraph III, making it necessary to refer to the portion of paragraph III appearing at page 90 of the record for the complete sense of this paragraph of the answer. Woolley admitted the amended paragraphs of the cross-claim by failure to answer them and he did not amend his answer after amendment of the cross-claim.

3. The Cross-claim of E. B. Woolley.

Woolley filed a cross-claim [R. 59] in which the United States of America appears as a nominal cross-claimant as authorized by the Miller Act (40 U. S. C. A. 270b). The cross-claim alleged that Woolley had furnished to Radkovich labor, equipment, supplies and materials and

that all of the same were furnished to be used and were actually used in the government work above referred to and that they had not all been paid for and that, therefore, Radkovich and its sureties were liable for the unpaid balance, and they were named as cross-defendants.

This cross-claim was amended [R. 82]. The answers of Radkovich [R. 71] and of Radkovich Sureties [R. 76] had been filed before the amendment but were couched in language sufficient to answer satisfactorily the supplement and amendment to cross-claim and were not subsequently amended.

4. Summary of Pleadings and Judgment.

The pleadings present what are in effect three separate but interlocking lawsuits. For convenience of distinction they will be hereinafter referred to respectively as the Westinghouse action, the Radkovich cross-claim and the Woolley cross-claim. Judgment in favor of Westinghouse was rendered against Radkovich and Radkovich Sureties [R. 204]. Judgment was granted in favor of Radkovich and Radkovich Sureties against Woolley and Glens Falls in an amount equal to the judgment in favor of Westinghouse [R. 204]. Woolley recovered upon his cross-claim against both Radkovich [R. 211] and Radkovich Sureties [R. 205] for the amount of labor and materials which went into the work and separately against Radkovich as a matter of incidental relief for loss occasioned by delay of Radkovich [R. 205].

The judgment expressly provided that the amount of the judgment against Glens Falls and Woolley should be reduced by the amount of the judgments in favor of Woolley [R. 205]. This leaves a balance payable by Woolley and Glens Falls.

II.

Jurisdiction of the District Court and the United States Court of Appeals.

1. Jurisdiction of the District Court.

a. AS TO THE WESTINGHOUSE ACTION.

Westinghouse based jurisdiction relating to its main claim upon the specific provisions of federal statute, 40 U. S. C. A. 270b, which provides in part:

“That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.”

The statute further provides that every suit instituted under this section shall be brought in the name of the United States for the use of the person suing in the United States District Court for any district in which the contract was to be performed. The complaint contained appropriate allegations to bring the action within these provisions of the law [R. 3, par. I].

Defendants Radkovich and Radkovich Sureties are alleged to be principals on the payment bond referred to in the statute which is required by 40 U. S. C. A. 270a [R. 7, par. IV]. The contract is alleged to have been

performed at Muroc, California, which is within the district of the trial court [R. 5, par. III].

Another phase of the Westinghouse action is a suit for the unpaid balance due to Westinghouse from Woolley on the purchase of electrical equipment which apparently relies for jurisdiction upon diversity of citizenship between Westinghouse, a Delaware corporation, and defendant Woolley. Neither the citizenship nor residence of Woolley is alleged in the complaint, nor does it appear elsewhere in the record.

b. AS TO THE RADKOVICH CROSS-CLAIM.

Jurisdiction of the Radkovich cross-claim is apparently based upon Federal Rules of Civil Procedure, Rule 13(g) and (h) and Rule 14, and upon the cross-claim being ancillary to the Westinghouse action. Appellant Glens Falls contends that the Radkovich cross-claim is not ancillary to the Westinghouse action and that since no independent basis of jurisdiction exists, the District Court lacked jurisdiction to entertain this cross-claim and to enter judgment thereon. See *United States v. Biggs* (D. C. E. D. Ill., 1942), 46 Fed. Supp. 8, 11; *Seaboard Surety v. United States* (C. C. A. 9, 1936), 84 F. 2d 348, and discussion Point VII-1 of this brief.

c. AS TO THE WOOLLEY CROSS-CLAIM.

The Woolley cross-claim is primarily based upon federal statute, the Miller Act (40 U. S. C. A. 270b), and the jurisdiction therein granted to the United States District Court. The cross-claim is brought in the name of the United States of America pursuant to authority referred to above relative to the Westinghouse action. The cross-claim alleges facts showing that the foundation for the action is a government contract within the district of the

trial court [R. 62] and subject to the provisions of 40 U. S. C. A. 270a, requiring a payment bond [R. 62] and that the same was provided by named sureties [R. 63] which sureties are Radkovich and Radkovich Sureties, the parties defendant. It states that certain sums are due and unpaid [R. 65-66]. A second cause of action is a restatement of the first in the form of a common count [R. 67]. A third cause of action seeks damage for delay caused by Radkovich.

2. Jurisdiction of the United States Court of Appeals.

Jurisdiction on appeal is based upon 28 U. S. C. A. 1291.

III.

Facts.

A contract [herein referred to as the prime contract, Ex. B], was entered into between the United States of America and Wm. Radkovich Company, Inc., a California corporation, for the construction of 100 poured concrete houses to be used for temporary family quarters for the Army Air Field at Muroc, California. The contract was dated June 19, 1947. The houses were an experimental type concerning which the government had no prior experience [R. 308].

In July of 1947, Wm. Radkovich, the individual who was President of the corporate party to these proceedings, and E. B. Woolley (an individual hereinafter referred to as Woolley), met each other for the first time while Woolley was doing electrical wiring at the home of Radkovich [R. 393]. As a result of this meeting, Woolley was persuaded to bid upon the electrical work which Wm. Radkovich Company, Inc. (the corporation, here-

inafter referred to as Radkovich), was required to do pursuant to the prime contract. Radkovich supplied Woolley with a set of specifications [part of Ex. B], and a drawing [Woolley's Ex. 5], showing the wiring required for each house [R. 394]. Based upon these documents, Woolley made his bid which was accepted and a subcontract was entered into dated July 30, 1947 [copy appears at R. 42; Ex. C].

The houses were to be constructed in the following way: An interior wall form would be set up. Woolley as the electrical contractor would then fasten steel tubing, outlet boxes and the like to the outside of this form [R. 266, 423]. Then another form would be set up in such a manner as to leave a space between the interior and exterior form. The electrical conduit, outlet boxes and any other electrical equipment which Woolley had fastened to the original form would be between the two forms. The space between the two would then be filled with cement [R. 274]. As soon as the cement hardened, the forms would be removed. This would leave a solid concrete wall with all of the electrical conduits and outlets in place. The tubing cast in the concrete might be likened to wormholes running through the wall just where they were needed.

Every one of the 100 houses was like each other one so that once the shape of the conduit or steel tubing could be determined, the conduit for all of the houses could be prefabricated and the electrical wire to go through the tubes could be cut to length [R. 265-266]. But no prefabricating of this character could be done until the design was settled because any change in the routing of the conduit would result in the waste of any steel tubing

bent or cut to conform to another design and a similar waste of any wire already cut with a consequent increase in cost [R. 396].

With this type of construction and a program for the construction of 100 identical houses, it hardly need be observed that much of the electrical subcontractor's work could be done before any house was poured and that considerable of the electrical subcontractor's work must necessarily be done before even the first house was poured.

Before the date of Woolley's subcontract, Radkovich received notice to proceed by letter dated July 22, 1947 [R. 206], and had commenced work July 28, 1947 [R. 300]. Radkovich started unloading equipment on July 31, 1947 [R. 306]. By letter dated August 8, 1947 [Woolley's Ex. 1], Woolley was given notice to proceed, to check with the General Superintendent, Mr. Ted Thompson, and to check all drawings for errors and discrepancies and report any errors to J. D. Barrington. After Woolley received this notice to proceed, he reported to the General Superintendent at the job site [R. 395], who told him that the work would commence right away and instructed Woolley to ship his materials and be ready to go about August 15, 1947 [R. 395]. Shortly after receiving the letter referred to above [R. 444], Woolley also went to see Barrington [R. 397].¹ There were two

¹About the same time by change order dated August 18, 1947, to the prime contract [see Ex. B] 100 electric heaters were deleted from the materials to be supplied by the contractor and consequently from the electric supplies to be supplied by Woolley, the subcontractor. There was a dispute between Woolley and Radkovich as to the amount of reduction which should be made in the subcontract price by reason of this modification. This issue was settled by the trial court and is not the subject of this appeal. This modification was fully authorized by the terms of the subcontract and is not disputed by appellant.

persons named Barrington who were employees of Radkovich. The record is uncertain as to the identity of the Barrington who figures in the testimony, but whichever one is referred to had charge of shop drawings [R. 372].

Woolley went to Barrington's office with his drawing to adjust some location changes [R. 397]. These were service objections (practical details) which the man in Barrington's office said he could not change without the okay of Keller, the chief electrical inspector. With Keller's okay, the man in Barrington's office got up a drawing [Woolley' Ex. 6], and Woolley approved it [R. 398]. Woolley could not commence wiring pursuant to this drawing because it had to go to the army engineers for approval. It was sent to the Radkovich office for processing through the office of the United States Engineers [R. 398].

Exhibit 6, was not approved and is marked unapproved. A substitute was then prepared and dated August 27, 1947. This substitute was entitled "Revised Electrical Plan, Muroc Army Air Field, Muroc, Cal. Temporary Family Quarters." Blueprints were made from this tissue tracing. One of them is Exhibit I [R. 364]. Then the tissue tracing was given to Woolley on or about August 27, 1947 [R. 253]. At about the same time, August 28, 1947, Woolley's crew came on the job and started prefabricating pipe [R. 261, 396]. There are various drawings of the electrical plan in evidence. There is some inconsistency which appears from the testimony of the various witnesses as to just which of the exhibits was on hand at the time of certain conversations and there is comment upon the difference between one of the exhibits and another; however, there is complete agreement as to essential substance.

There are two drawings actually in issue. One of such drawings is represented by Exhibit 5, J, and sheet No. 6 of Exhibit H, which is the drawing upon which Woolley's bid was based. These are all identical in the drawing detail shown. This will hereinafter be referred to as the Original Electrical Drawing. The other is the Revised Electrical Plan above referred to which is represented by Exhibits I, K and 11. Except for penciled notes of approval or a stamp of approval, the Exhibits I, K and 11 are all identical. In other words, they are identical in the drawing detail shown and there is no dispute but that they originated August 27, 1947. Hereafter this drawing will be referred to as the Revised Electrical Plan.

When Woolley received the Revised Electrical Plan he noticed that additional detail had been added [R. 253], which required additional work and materials the necessity for which was not reflected on the Original Electrical Drawing [R. 400]. The additions turned out to be an additional cost to Woolley of \$8,277.67 [Finding XV, R. 198]. The total subcontract price, not including the items making up the \$8,277.67, was \$74,500.00 after equitable adjustment for deletion of electric heaters by change order referred to in footnote 1 above [Finding XIII, R. 197].

Woolley and Higuera, Woolley's employee, immediately [R. 400], went to see Mr. Parks, a Radkovich employee who had charge of coordinating the work with the government and subcontractors [R. 272-273]. According to Woolley, Mr. Wm. Radkovich was also present [R. 400]. This is not inconsistent with Parks' statement concerning the conversation because Parks was not asked to testify

as to who was present. According to Parks, this conversation took place on August 27 or 28, 1947 [R. 355].

Woolley pointed out the differences between the Original Electrical Drawing and the Revised Electrical Plan. He specifically pointed out that the Revised Electrical Plan showed items that did not appear in the previous drawing, including telephone circuits, signalling system (also referred to as bell circuits and chime circuits), closet lights and fixtures [R. 356, 374, 401]. Woolley testified that he told Mr. Radkovich that he had never figured on these changes and asked what Mr. Radkovich was going to do about it. Mr. Radkovich replied that he did not know and asked Mr. Parks the same question. Mr. Parks stated that he did not know; that the former plan had been approved and he did not know why the contractor would have to "put this other stuff in" [R. 401]. Parks telephoned the office of the army engineers and made an appointment for the next morning. Mr. Parks and Woolley went to the office of the army engineers the next morning to see Mr. McCumber who was responsible for drawings and channeling them through the office of the United States Engineers to obtain approval [R. 356, 401].

The Revised Electrical Plan and the additional features shown thereon were discussed with Mr. McCumber. Woolley asked who would pay for the added items. McCumber told him that they were in the prime contract and that Woolley and Radkovich would have to get together on the problem of payment and that this was not within the jurisdiction of the engineers and that Woolley had no standing in their office. The engineers only recognized the prime contractor [R. 357, 401-402].

Woolley and Parks left McCumber's office and Woolley returned to see Mr. Radkovich either the same day or later in the same week [R. 402]. Mr. Radkovich testified about this meeting with Woolley. He said that he told Woolley that he would see that Woolley was paid for the bell system. He said he was confused as to whether it was the bell system or the telephone system that they were discussing and conceded that it could have been both. He said that there was also discussion about closet lights and he acknowledged that he might have said that he would see that Woolley was paid for this item [R. 271-272]. It is worthy of note that this testimony includes three out of four of the items which were added on the Revised Electrical Plan. No question was put to the witness as to the fixtures, the fourth item.

We quote the testimony of Woolley concerning this same meeting [R. 402]:

“Q. Did you have a further discussion then after that with Radkovich as to what was to be done about these so-called extras? A. Well, in (*sic*) the same day but later in the week, why, we had to get going on it, so I went over to see him. And he said the army was going to take the job away from him if he didn't get started here. It had already been delayed for quite a while; for me to go ahead and wire to this plan and he would take care of the extras, he would pay me for them.

The Court: Who said that?

The Witness: Wm. Radkovich.

Q. (By Mr. Benedict): Did you thereupon proceed with the performance of your subcontract? A. I did.”

The words "in" and "not" have the same shorthand character. It is therefore reasonable to assume that Woolley testified, "Well, not the same day, but later in the week, . . ." He saw Radkovich not the same day that he saw McCumber, but later in the week. Assuming the testimony of Parks to be correct, that Woolley and Higuera came in to see him on the 27th or 28th, the week would have ended on Saturday, the 30th. The next Monday, September 1, 1947, was Labor Day, and it may be that Woolley's meeting with Mr. Radkovich which was the subject of the above testimony was not during the Labor Day weekend, but afterward during the week starting Sunday, August 31, and ending Saturday, September 6. The Revised Electrical Plan had apparently not been officially approved by the engineers as of the date of the above conversation for the stamp of approval by the United States Army Engineers is dated 26 September 1947. As noted below, Woolley's testimony taken as a whole was to the same effect [R. 396].

Notwithstanding the conversation with Mr. Radkovich, which no doubt satisfied Woolley as far as it went, it was not economically safe for Woolley to do any prefabricating work until the drawings had received official approval of the United States Engineers, so consequently at this point he ordered his crew to stop prefabricating [R. 374, 396]. Note Woolley's testimony that he stopped the crew because "we didn't know, until the Army approved, what the changes were going to be, whether they were going to approve the changes or not." [R. 396.] This indicates that the tissue drawing of the Revised Electrical Plan given to him before the conferences related above was not already approved by the engineers.

Therefore, it must have been Exhibit K and not Exhibit 11, which he had at the time of the conferences. And the conferences must have taken place in August as Parks said. This is consistent with Woolley's testimony that the crew had been on the job about a week (they started August 28, 1947), doing the prefabricating work and had accomplished only about \$200.00 worth of constructive work. Even a shorter period on the job of prefabricating could, we think, account for \$200.00 worth of constructive work, so that if they went to work on August 28, and were ordered to stop on September 30, the result is not contrary to what might be reasonably expected.

As already observed, shop drawings as worked out in Barrington's office had to be processed through Radkovich's office to the engineers for final approval [R. 398]. Woolley testified that he "wired to this plan" [R. 402-403], but that he commenced operations October 4, 1947 [R. 396]. We assume that the blueprints taken from Exhibit K, prior to delivering it to Woolley were processed through the office of the United States Engineers obtaining official approval on September 26, 1947, and that around September 30, 1947, [R. 399], an approved drawing [Ex. 11], was delivered to Woolley. He then commenced work with assurance that the plan was officially approved. This would allow sufficient time to do what was necessary on this part before the first house was poured (on either October 2, or 4, 1947).

We have detailed this evidence in an effort to arrive at some logical and consistent sequence of events, but we acknowledge that Woolley's testimony as to the *date* of his conversations with Mr. Radkovich, Parks and Mc-

Cumber is not in accord with this statement [R. 399]. Neither is Woolley's testimony as to this date in accord with the rest of his own testimony or the testimony of other witnesses. We believe that Woolley's testimony as to the *date* of the conversations is based upon his mistake in identifying Exhibit 11, as the tissue tracing he had in hand during the conversations instead of Exhibit K.

Woolley based his identification upon the fact that it bore the approval stamp of the District Engineer. This is the very thing which should have indicated that Exhibit 11, was not the one for, as noted above, Woolley stopped his crew right away because he didn't know whether the engineers would approve the changes indicated or not [R. 396] and his crew which started work August 28, 1947, did less than a week's work before they were stopped [R. 397]. None of these things are consistent with the idea that Woolley received the Revised Electrical Plan for the first time about September 30, 1947, as he testified at page 399 of the record.

On the other hand, both Exhibit K and Exhibit 11 had approvals on them. Exhibit 11 had the stamp of the District Engineer. Exhibit K had the penciled notation of approval by Keller, the chief electrical inspector on the job. It seems most reasonable to assume that this fact caused Woolley to make a mistake in identity. This is in direct conformity with Park's testimony [R. 354, 364] and Woolley's other testimony noted above. Mr. Parks positively identified Exhibit K as the one Woolley had with him.

There is one difficulty or inconsistency remaining. The penciled approval by Keller on Exhibit K bore a date which was read in evidence as 9/26/47 [R. 364]. But

Mr. Parks was of the opinion that the date was actually 8/26/47. No one took issue with that opinion. We assume that it is right. There still seems to be a one-day discrepancy since the Revised Electrical Plan itself is dated August 27, 1947. It is an easy thing to make an error in writing a date. Moreover, there is no testimony that it is Keller's handwriting. It may even be that this notation was made by someone else than Keller to record the fact that Keller's approval to the changes indicated was given on that date. To give maximum support to the findings, the general conflict in the evidence must be resolved this way.

The court did not attempt a chronological statement in the Memorandum of Conclusions, but treated the issues according to subject matter. For this reason the conflict was not recognized. Note the court's statement [R. 100]:

“The evidence is clear that Woolley received notice to proceed prior to August 28, 1947, and that the contractor had not ‘poured’ any houses in which Woolley could place electrical wiring until October 4, 1947.”

The date of October 4, 1947, a Saturday, apparently comes from Woolley's uncertain testimony on page 396 of the record as to when he commenced operations. This conflicts with the allegation in Woolley's cross-claim that it was Monday, October 6, 1947, that he commenced operations [R. 69, 96]. The more reliable statement seems to be from Mr. Ferguson, the resident engineer, who positively stated that the first house was poured on a Thursday, October 2, 1947 [R. 267].

The quotation shows that the court was under the impression that no part of the electrical work could be

done until a house had been poured. The same error appears in [Finding XVI, R. 199]. As a consequence of this misunderstanding, the court apparently accepted Woolley's version as to the date he commenced operations and as to the date of his conference with Mr. Radkovich which results in such a conflict in Woolley's testimony as to leave his claim for damages for delay entirely without support because there would be no reason for an idle crew which could have prefabricated during the entire month of September, 1947, were it not for the unapproved changes in the drawings. Woolley testified that his men went to work August 28, 1947, and that he ordered them to stop after only a week of prefabricating because of the Revised Electrical Plan which he had just received [R. 397].

If he did not receive the Revised Electrical Plan until September 30, 1947, then they must have worked a month and any stop order given September 30, 1947, or thereafter was only for a day or so because he recommenced, according to his own statement, by October 4, 1947, contrary to his testimony that they only prefabricated for a week. Moreover, giving credence to the shortest time element which his testimony will support in seeing Mr. Radkovich, and Parks and, the next day McCumber, and, the next day, Mr. Radkovich, the September date is wrong because the first house would have been poured at a time when Woolley's men were off the job or on the very day of Woolley's talk with Mr. Radkovich. This of course is impossible since, according to all the testimony, the first house, like every other house, was wired according to the Revised Electrical Plan. Woolley's electrical work is in the cement casting,

having been placed there prior to the time the house was actually poured.

In order to make a statement of facts which is understandable, it is necessary for appellant to try to put into sequence such of the evidence as is important to the questions raised and to an understanding of the case. This has the effect of pointing up the conflicts and necessitates the foregoing and the following attempts to reconcile the testimony.

The really important misstatement or misconception of the evidence by the trial court is evidenced by this statement made by the court [R. 135]:

“We are satisfied that if Woolley ever understood that Radkovich had agreed to compensate him in addition to the sum of his subcontract, *such understanding was of short duration*, and was dispelled by correspondence before the fixtures, etc., were installed by Woolley.” (Emphasis added.)

This is a serious error. As a matter of fact, Woolley's testimony immediately following that portion of his testimony quoted above is as follows [R. 403]:

“Q. After you had started on the performance of your subcontract did you have any further conversations with Radkovich relative to your furnishing electrical fixtures? A. *Not until quite late in the contract*. They sent me a letter asking for a brochure on the fixtures and I called Parks back and told him that I was not supposed to furnish the fixtures. And he said I had better come over and get together with Bill and him, and I did that, and that was quite an argument we had that day and wound up with Radkovich saying: ‘It is in the specification.

You are stuck with it and you are going to furnish them.' Of course, I walked out pretty hot, and I guess everybody was pretty hot that day. However, I went back again. Well, it turned out the same way, though. I mean we couldn't agree on the fixtures, and so he felt that I was supposed to supply them, and I felt that I was not; so it was just left at that until these letters came into effect." (Emphasis added.)

The proximity of this testimony to the testimony of the earlier conference in the record may have led the court to believe that in point of time one soon followed the other.

The actual time of the latter is not identified except by reference to a letter asking for a brochure. It should also be noted that the question and the answer last above quoted relate exclusively to fixtures. It seems most likely that this relates to the request to which Woolley's attorney responded by letter dated May 25, 1948, which is a part of Exhibit 10. The above quoted testimony therefore probably relates to a discussion between Woolley and Mr. Radkovich in May of 1948. It is an indisputable fact that most of the contract had been completed between the first conversation, whether in August or September, 1947, and the second. The first conversation was before the first house was poured. The second was at a time of 87% contract completion. The 7th progress payment based upon 87% completion was made in May of 1948. *The time element between the two conversations was seven or eight months.*

In the course of the trial there was considerable testimony as to just what had been added by the Revised Electrical Plan [R. 271-272, 263-265, 311-341, 357, 367,

375-376, 400, 412-418, 434-451, 462-463, 467-477]. The detail of this testimony is unnecessary to this appeal except to note that the telephone circuits, the bell circuits, the closet lights were all included. As the work progressed each house contained all of the items. In order to install them, it was necessary for Woolley to redesign the conduit he was fabricating and to add such additional material as the items called for [R. 396, 400-403, 457]. The additional material as well as the additional expense went into the job daily, resulting in a change in the performance of the subcontract from the beginning.

Materials for the job as specified in the Revised Electrical Plan had to be purchased and kept on hand as the work proceeded. Payment was authorized and made, taking into consideration all of the materials on hand and all of the work done by Woolley at the time the estimate was prepared [Ex. B, Art. 16, R. 261 and Ex. A, Art. 3, R. 44-45 and 458]. There is no testimony or evidence of any intent to segregate the cost of materials or labor between what was called for by the Original Electrical Drawings and those added by the Revised Electrical Plan which additions have been misleadingly referred to as extras.

As some of the houses neared completion, the Government began to write to Radkovich about the fixtures [Ex. F]. As is evidenced by the correspondence which is in evidence as Exhibit F, Radkovich passed the Government's inquiries and demands on to Woolley. Early in May, 1948, the issue of who would furnish and install fixtures and for what compensation was precipitated [R. 403]. At this time Woolley and Radkovich had the conference in which Woolley testified everybody "got pretty

hot" [R. 403]. After that Radkovich took the position that Woolley was responsible for the fixtures and also all of the other items formerly discussed and that Woolley was entitled to no increase of his subcontract price. Radkovich contended that they were all a part of the subcontract and maintained this position throughout the trial [R. 403, 130].

Woolley took the position that he was entitled to be compensated for all of these items over and above the subcontract price [R. 402]. He never retreated from this position [R. 476]. On June 1, 1948, a conference was held between Mr. Woolley, Mr. Radkovich and their attorneys, Mr. Shafer and Mr. Benedict, respectively, and Mr. Bray of Glens Falls and attorney Decker for Glens Falls [R. 241-242]. On June 7, 1948 [R. 420], after giving notice [Ex. 10], Woolley walked off the job and stayed off about one week [R. 262, 352]. Pursuant to demand of Radkovich in a letter to Woolley dated June 10, 1948 [Ex. F], and a reply letter from Woolley dated June 12, 1948 [Ex. 10], reserving all of his rights, Woolley returned to the job on June 14, 1948 [R. 425]. He completed the subcontract on October 6, 1948 [R. 200, 397].

Both contractor and subcontractor went broke on the job [R. 307-308 and 479]. The Government took the job over from Radkovich [R. 307] and Woolley had not paid Westinghouse which had supplied him with the electrical equipment [R. 196]. On or about April 10, 1948, West-

inghouse gave written notice to Radkovich that Woolley had not paid to Westinghouse a past due account in the sum of \$34,514.05 for materials supplied to Woolley and used in connection with Woolley's work provided for in the electrical subcontract [Finding XII, R. 196-197]. Radkovich gave written notice to Glens Falls of this claim by Westinghouse on June 10, 1948 [Ex. F], which was more than 60 days after Radkovich had received the said notice from Westinghouse on April 10, 1948. So, while Woolley was completing the job, Westinghouse had notified Radkovich of Woolley's failure to pay for equipment and Radkovich had withheld further payments on the subcontract. Westinghouse sued Woolley on his purchase contract and Radkovich Sureties on a Miller Act bond provided by Radkovich. Woolley cross-claimed against Radkovich and Radkovich Sureties on the same bond. Radkovich and Radkovich Sureties cross-claimed against Woolley and Glens Falls, surety for Woolley, on two bonds provided by Woolley to Radkovich.

The continuity of the foregoing facts is most important for an understanding of the case. So we have not interrupted it by interspersing the facts relative to payments under the subcontract, but we now turn to this subject.

Both the prime contract and the subcontract provided for what we will refer to as progress payments. The prime contract provided that payments would be made to Radkovich each month of a percentage of the prime contract price equal to percentage of completion accom-

plished on the job less a 10% holdback [Ex. B, Art. 16]. The subcontract had a similar provision [Art. 3, R. 44]. The value of any materials on hand at the job site was to be taken into consideration in estimating percentage of completion of the job [Ex. B, Art. 16]. Each month the percentage of completion was estimated by the Resident Engineer (a Government employee, Mr. Ferguson), with the aid of the contractor [R. 343].

The prime contract was made up of certain items. The Resident Engineer estimated the percentage of completion of each item. The electrical subcontract work was a portion of item three [R. 274]. But item three included electrical, plumbing, painting, cabinet work and the pouring of the cement house [R. 274-275, 283-284]. Thus the estimate officially made by the Resident Engineer would reflect the sum of the items making up item three. Theoretically then, the first estimate of the percentage of item three might include complete performance of the electrical work and only a very slight performance of the cement pouring, or any other combination of the various parts of item three to make up a given percentage of completion of the total item.

However, we know from the testimony of the witnesses as to the method of construction and the character of the electrical work that this could not be and was not the case [R. 283]. On the contrary, each house had the same amount of electrical wiring as every other house and the same was true of each item making up item three.

The cabinet work and the painting could not have started at the same time as the electrical work, but the proportion of the electrical work completed must have had a very close relationship to the proportion of item three completed. Due to materials on hand early in the contract, the electrical work percentage of item three may have been proportionately high.

The Resident Engineer voluntarily and unofficially furnished Radkovich with an estimate of the amount of money that he considered should be paid to Woolley each month [R. 288-290]. This was furnished on a slip of paper which has been destroyed [R. 290]. On the first estimate, the Resident Engineer certified to Radkovich in the unofficial way above described that \$5,000.00 was due to Woolley [R. 289-290].

Woolley also produced an estimate showing \$9,885.37 as the amount due to him at this time [R. 427, Ex. 13, ltr. dated Sept. 25, 1947]. This estimate indicated that the total was made up of materials on the job site and included no labor. Woolley was paid \$5,000.00 on account of this estimate [R. 427, 262]. Woolley told Radkovich that "he couldn't operate unless he got \$4,000.00 more" [R. 261-262, 291 and 125]. By separate check from the prime contractor, Woolley was paid \$4,000.00 more [R. 262]. This, according to the testimony of Mr. Radkovich, was a loan and not an advance, although it is a fact that the \$4,000.00 was taken out of amounts later concededly due Woolley [R. 262, 291-292, 428]. Woolley paid Rad-

kovich \$500.00 which Mr. Radkovich and Woolley testified was interest demanded by Radkovich for the \$4,000.00 [R. 262, 428].

The second estimate certified by the Resident Engineer was \$15,000.00 [Ex. 2c]. Woolley's estimate submitted at this time was \$16,551.09 [Ex. 13, ltr. dated Nov. 1, 1947]. Concededly this estimate by Woolley included all of the materials theretofore listed on the first estimate. From a comparison of the statements rendered by Woolley [Exs. 13a and 13b], it is apparent that Woolley included all of his expenditures for labor and materials in his second estimate [Ex. 13b]. He was paid \$15,000.00 on account of this estimate [R. 428], making a total payment to that date of \$20,000.00.

The third estimate submitted by Woolley was submitted upon a new and different basis at the request of Radkovich [R. 430-431] and acceded to by Woolley [R. 430-431]. This was on the basis of \$390.00 per house, a unit method of payment rather than the progress method of payment provided for in the subcontract [Ex. C]. When this estimate was submitted, Mr. Radkovich told Woolley to accept \$200.00 per house and that this was necessary because the Radkovich corporation was in financial trouble [R. 430-431]. Woolley thereupon agreed to the new method suggested and then accepted \$3,000.00 which was a payment upon the unit price of \$200.00 per house. That this was the unit basis agreed upon is further evidenced by the next estimate submitted by Woolley on the same basis [R. 431-432].

We believe that the foregoing statement of facts is sufficient for the purpose of considering the issues raised in this appeal.

IV.

The Questions Involved and the Manner in Which They Are Raised.

All of the questions involved were raised in Points on which Appellant Intends to Rely on Appeal [R. 523-533], excepting the question of jurisdiction of the court. These Points on which Appellant Intends to Rely on Appeal are repeated in this brief at Point V under the heading SPECIFICATION OF ERROR RELIED UPON, and they are numbered in the same way as they were numbered in the Points on which Appellant Intends to Rely on Appeal, so that the court, in turning to these points as referenced in the following questions, may turn to the equivalent numbers under Point V, which follows this listing of questions in this brief. The jurisdictional point has been added as Point 5 to the SPECIFICATION OF ERROR RELIED UPON.

1. Does the District Court Have Jurisdiction of the Controversy Raised by the Radkovich Cross-claim?

This question was raised in Point II above in this brief and apparently has not heretofore been considered. For argument concerning this question, see Point VII-1 following in this brief.

2. Does the Radkovich Cross-claim State a Claim Upon Which Relief Can Be Granted?

This question was first raised in the answer of cross-defendant Glens Falls [Sixth Affirmative Defense, R. 40]. The question was disposed of in the court's Memorandum of Conclusions [R. 127] in one sentence. It was disposed of in the findings, if at all, by the following sentence [R. 201]:

“That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses.”

This question was raised in Points on which Appellant Intends to Rely on Appeal, Point 1-A and B [R. 523-524]. For argument concerning this question, see Point VII-2 following in this brief.

3. Can Recovery Be Predicated Upon the Payment Bond Since Cross-claimants Failed to Plead or Prove That They Have Suffered Any Loss or Damage?

This question was raised in Points on which Appellant Intends to Rely on Appeal, Points 1-B [R. 524] and 3-A [R. 530]. It is not the subject of any finding or conclusion of law. For argument concerning this question, see Point VII-3 following in this brief.

4. Was Glens Falls Released From Liability to Radkovich and Radkovich Sureties Because the Subcontract Was Materially Altered Without the Consent of Glens Falls, Woolley's Surety?

This question was raised by the Second Affirmative Defense [R. 38], the Fourth and Fifth Affirmative Defenses [R. 39] and the Seventh Affirmative Defense [R. 40] of answer of cross-defendant Glens Falls. The question as such was not actually considered in the court's Memorandum of Conclusions and only incidentally disposed of in the last sentence of the findings [R. 201]. This question was also raised in Points on which Appellant Intends to Rely on Appeal, Points 2-D [R. 527-529], 2-E (b), (c), (d) [R. 530] and 3-B [R. 531-533]. For argument on this question, see Point VII-4 following in this brief.

5. **Can Recovery Be Predicated Upon the Performance Bond Notwithstanding Woolley's Complete Performance and the Failure of Radkovich to Comply With the Express Conditions Precedent to Recovery Therein Contained?**

This question was first raised by the affirmative defenses of the answer of cross-defendant Glens Falls. This question was treated as an issue by all parties throughout the trial, argued in the briefs upon which the case was submitted after the trial was over and was mentioned incidentally by the court in its Memorandum of Conclusions [R. 116]. The court found that Woolley fully performed the subcontract [Finding XIII, R. 197 and Finding XVI, R. 200], but did not otherwise specifically find on this issue. This question was raised in Points on which Appellant Intends to Rely on Appeal, Points 2-A, B and C [R. 524-527]. For argument on this question, see below in this brief, Point VII-5, 6, 7 and 8.

6. **Is Finding of Fact XVIII That Glens Falls Has Failed to Establish Any of the Allegations Relied Upon as Defenses, Unsupported by the Evidence?**

This question was raised in Point 2-E of Points on which Appellant Intends to Rely on Appeal [R. 529-530]. For discussion of this point in argument, see this brief, Point VII-8.

7. **Should the Payment Bond and Performance Bond Be Construed Together?**

This point was raised at the trial and treated as an issue by the trial court in its Memorandum of Conclusions [R. 116]. There was no finding on this question. For argument concerning this question, see this brief, Point VII-9.

8. **Must This Case Be Reversed Because of Error in Granting a Judgment Against Glens Falls for the Full Amount of the Westinghouse Judgment, Which Included Not Only the Obligations Assessable Against the Subcontract, but the Extras as Well?**

This question was raised in Points on which Appellant Intends to Rely on Appeal, Points 2-D(a) [R. 527] and 3-B(a) [R. 531]. For argument concerning this question, see Point VII-10 following in this brief.

V.

Specification of Error Relied Upon.

[This is a duplication of Points on which Appellant Intends to Rely on Appeal appearing in the record at pp. 523 to 533, except for the addition of Point V regarding jurisdiction.]

1. **The Cross-claim of Cross-complainants Fails to State a Claim Against Appellant Upon Which Relief Can be Granted in the Following Particulars:**

(A) Said cross-claimants failed to make any allegations showing liability of appellant and further failed to allege either compliance by Wm. Radkovich Company, Inc., or an excuse for non-compliance, with the express conditions precedent to liability of appellant on said Performance Bond.

(B) Said cross-claimants failed to make any allegations showing liability of appellant and particularly failed to allege that the obligee (Wm. Radkovich Company, Inc.) named in the Payment Bond suffered loss or damage while the said bond only obligated the appellant to “indemnify and hold obligee free and harmless from and against all loss and damage.”

2. **The Judgment Against Appellant Cannot Be Predicated Upon Appellant's Performance Bond for the Following Reasons:**

(A) The trial court found in Findings XIII and XVI that E. B. Woolley, the principal on said bond, fully completed the work specified in the subcontract in question between Wm. Radkovich Company, Inc. and E. B. Woolley upon completion of which the obligation of appellant under the Performance Bond was to cease. Therefore, these Findings do not support Conclusion of Law II or the Judgment against appellant insofar as said Conclusion of Law and Judgment are based upon the Performance Bond.

(B) Evidence was introduced upon the material issue of fact raised by appellant at the trial that the obligee, Wm. Radkovich Company, Inc., failed to comply with the express conditions precedent contained in said Performance Bond and the court erred in failing to make findings upon the material issues of fact raised by the said express conditions precedent which are express conditions precedent to liability of appellant. Conclusion of Law II and Judgment against appellant are therefore not supported by the Findings.

(a) Evidence was introduced on the issue of compliance by the obligee with the express condition precedent in said bond which reads, "The said Surety shall be notified in writing of any act on the part of said Principal, or its agents or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, * * *" The trial court failed to make any finding upon the material issue

of fact of whether said condition precedent was complied with in two particulars: First, as to whether any notice was given to appellant when Wm. Radkovich Company, Inc. was advised by the principal, E. B. Woolley, that he was in financial difficulty and, Second, as to whether the giving of notice to appellant some sixty-one days after receiving the claim of Westinghouse Electric Supply Company for the payment of \$43,514.05 for materials supplied to, but not paid for by E. B. Woolley is in compliance with said express condition precedent. In this respect the Findings are lacking on a material issue of fact necessary to support Conclusion of Law II and the Judgment against appellant.

(b) Evidence was introduced in many particulars relative to the performance and failure of performance of the subcontract by Wm. Radkovich Company, Inc. The trial court failed to make any finding as to whether Wm. Radkovich Company, Inc. well and truly performed and fulfilled all of the undertakings, covenants, terms, conditions and agreements of the said subcontract. An affirmative finding of such performance is necessary to sustain Conclusion of Law II and the Judgment against appellant because such performance is an express condition precedent to recovery against appellant upon the Performance Bond.

(C) Said cross-claimants failed to prove a material and substantial element of their claim in that they failed to show that E. B. Woolley had been paid according to the terms of the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley, thus failing to establish performance of express conditions precedent contained in said Performance Bond.

(It affirmatively appears from Finding XVIII that cross-claimants entirely failed to prove compliance with the first express condition precedent to the right to recover against appellant on the Performance Bond which condition is, "The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified." In Finding XVIII, the court found, "That there is no evidence from which the court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month." The burden of showing compliance with the subcontract, including payment in accordance with its terms, as an express condition precedent to recovery was on cross-claimants. Conclusion of Law II and the Judgment against appellant are therefore unsupported by the Findings and impeached by Finding XVIII.)

(D) Appellant was exonerated from liability upon said Performance Bond because after the execution of said bond, the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the knowledge or consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially

altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any materials were furnished by E. B. Woolley other than those purchased from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate that there were any “additions to the structures and improvements covered by said contracts.”

The only rationale of the Findings is that the subcontract was altered by the addition of \$8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written

exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to “extras” likewise impeaches Conclusion of Law II and the Judgment in that appellant’s bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned. Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are therefore, not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that

there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

(E) That portion of Finding XVIII which reads, "That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses" is unsupported by the evidence in the following particulars more specifically detailed above:

(a) The cross-claim fails to state a claim against appellant upon which relief can be granted.

(b) The subcontract was materially altered by the parties thereto after the said bond was executed and without knowledge or consent of appellant.

(c) Payments were made by Wm. Radkovich Company, Inc. to E. B. Woolley before said sums were earned by E. B. Woolley.

(d) Wm. Radkovich Company, Inc. required E. B. Woolley to furnish extra and additional materials and to perform extra and additional work not called for by the subcontract.

3. The Judgment Against Appellant Cannot Be Predicated Upon Appellant's Payment Bond for the Following Reasons:

(A) Wm. Radkovich Company, Inc., the obligee under said Payment Bond has not suffered such loss or damage as appellant is bound to indemnify said obligee against.

(The Payment Bond being a bond of indemnity only, Wm. Radkovich Company, Inc., the obligee named in the

Payment Bond, is not entitled to recover against appellant unless he has paid the claim of Westinghouse Electric Supply Company. There is neither allegation nor evidence of such payment and there is no finding upon this issue which is a material issue of fact. Therefore, Conclusion of Law II and the Judgment are unsupported by the Findings.)

(B) Appellant was exonerated from liability upon said Payment Bond because after execution of said bond the subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley was materially altered by the parties thereto without the consent of appellant in the following respects:

(Appellant asserts that the trial court committed reversible error for failing to make a finding on the material issue of fact as to whether the subcontract was materially altered after the execution of the bond in question without the knowledge or consent of the surety and further that the Findings made which relate to this issue are in direct and irreconcilable conflict and that in this respect the Conclusions of Law and Judgment are unsupported by the Findings.)

(a) Wm. Radkovich Company, Inc. required E. B. Woolley to perform certain work and to furnish certain materials not within the scope of the subcontract or any authorized modification thereof.

(Finding XV is unsupported by the evidence in that there is no evidence indicating that any materials were furnished by E. B. Woolley other than those purchased

from Westinghouse Electric Supply Company. The court has found that all of the materials furnished by Westinghouse Electric Supply Company were used by Woolley in the performance of and in the work required by, the subcontract—Findings XI, XII. The only other materials were furnished by Wm. Radkovich Company, Inc. and were used in the performance of the subcontract—Finding XIV.

Finding XV is further unsupported by the evidence in that there is no evidence to indicate there were any “additions to the structures and improvements covered by said contracts.”

The only rationale of the Findings is that the subcontract was altered by the addition of \$8,277.67 worth of extra work and materials. Otherwise, Findings XI, XII, XIV and XV are in irreconcilable conflict. In either event, they do not support Conclusion of Law II or the Judgment against appellant. As a matter of law, such a material alteration of the contract after the bond was written exonerates the surety. Any interpretation of the Findings which connotes a separate agreement as to “extras” likewise impeaches Conclusion of Law II and the Judgment in that appellant’s bond runs only to the subcontract, and no other, and appellant cannot be held responsible for materials not used in the subcontract. The Findings are not adequate to make segregation of materials between the subcontract and what is referred to as extras and hence there is no alternative to reversal.)

(b) Wm. Radkovich Company, Inc. paid certain sums of money to E. B. Woolley before such sums of money were earned by or payable to E. B. Woolley pursuant

to the terms of the said subcontract which provided a schedule of progress payments.

(Findings XVII and XVIII are inadequate to sustain Conclusion of Law II and the Judgment. The trial court has failed to make a finding on the material issue of fact as to whether E. B. Woolley was paid money before such money was earned. Evidence was introduced from which the fact is apparent. It is reversible error not to make a finding on this issue.)

(c) Wm. Radkovich Company, Inc. and E. B. Woolley changed the method of payment under the said subcontract from the progress payment method of payment therein provided for to a unit method of payment.

(Finding XVIII is inadequate to resolve the material issue of fact above stated upon which evidence was introduced. The trial court failed to find upon this issue and Conclusion of Law II and the Judgment are, therefore not supported by the Findings of Fact. Appellant further contends that Finding XVIII is unsupported by the evidence insofar as said finding is to the effect that there was no departure from the terms of the subcontract with reference to the method of payments to E. B. Woolley.)

4. **The Performance Bond and the Payment Bond Should Be Construed Together and the Conditions Precedent to Recovery on the Performance Bond Should Apply Equally to the Payment Bond and All of the Points Relating to Conditions Precedent Which Appellant Has Specified Relative to the Performance Bond Apply Equally to the Payment Bond.**
5. **The District Court Lacked Jurisdiction of the Radkovich Cross-claim.**

VI.

Introduction to Argument.

The court expressly found that Woolley fully performed the subcontract. This finding would seem to be enough to justify the assumption that the judgment rests upon the payment bond. However, there is no finding or conclusion of law which by its express terms precludes the performance bond as a basis of judgment. This would seem to be sufficient to require discussion of the defenses to liability upon the performance bond. We have further reason. Appellant contends that the two bonds should be construed together because both are exclusively for the protection of Radkovich and if Radkovich has not seen fit to faithfully carry out his obligations to Woolley and to Glens Falls in matters substantially affecting the subcontract and the risk taken by Glens Falls, he should be barred from recovery.

Since the performance bond appears to be of secondary importance, we will first discuss those points of error which directly relate to the payment bond. Comments upon points relating exclusively to the performance bond will be treated with brevity. Appellant believes that the error relative to the points raised concerning both bonds is such as to require exoneration of Glens Falls from liability and that in any event the absence of findings on essential facts and uncertainty of other findings must at least compel reversal.

VII.

ARGUMENT.

1. **The District Court Lacked Jurisdiction of the Radkovich Cross-claim.**

a. **Jurisdiction of the Controversy Is Lacking Unless the Radkovich Cross-claim Is Ancillary to the Westinghouse Action.**

As already pointed out above, jurisdiction of the Radkovich cross-claim is dependent upon being ancillary to the Westinghouse action because it contains no jurisdictional statement. This conclusion results from the following analysis of the jurisdictional basis for this pleading.

The cross-claim is based upon private contract between Radkovich as obligee and Glens Falls and Woolley as surety and principal. The contract was in the form of a surety bond which is not required by any statute, law or ordinance. That there is not complete diversity between plaintiff, cross-claimants and cross-defendants is apparent from the fact that one of Radkovich's sureties, Excess Insurance Company of America, is a New York corporation, as is also Glens Falls, and the necessary jurisdictional statement regarding Woolley's citizenship and residence is absent.

b. **If Ancillary to the Westinghouse Action at All, the Cross-claim Must Be Ancillary to the Miller Act Phase of the Westinghouse Complaint.**

The Westinghouse action has two phases: The first phase is the Miller Act action against Radkovich and Radkovich Sureties. Jurisdiction for such an action is speci-

fically conferred by provision in the act itself and is not dependent upon the amount involved in the controversy or upon diversity of citizenship. The second phase depends upon diversity of citizenship for jurisdiction because this phase of the action is a simple suit upon the contract obligation of Woolley to Westinghouse.

Rule of Civil Procedure 13(g) provides for a cross-claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action, and 13(h) authorizes the court to order in a third party not a party to the original action if such third party is necessary to grant complete relief in the determination of a cross-claim. Rule 14 permits bringing in a third party who is or may be liable to a defendant for all or part of plaintiff's claim against such defendant. It should be observed that the Radkovich cross-claim does not arise out of the transaction or occurrence that is the subject matter of the second phase of the original action (between Westinghouse and Woolley). Moreover, by no stretch of the imagination could Glens Falls or Woolley be liable to Radkovich, nor would any duty which could be the basis for a claim between Radkovich and Radkovich Sureties on one side and Glens Falls and Woolley on the other arise out of a judgment obtained by Westinghouse against Woolley, so that the cross-claim could not be based upon the Westinghouse v. Woolley phase of the Westinghouse action under either rule.

However, there is an additional reason why the Radkovich cross-claim could not be based upon this second phase of the Westinghouse action. The District Court has no jurisdiction over this phase of the action because the Westinghouse complaint does not allege Woolley's citi-

zanship or residence. These jurisdictional facts must appear expressly in the complaint. (*Brown v. Ingraham* (D. C. Pa., 1951), 11 F. R. D. 522; *Bates v. United States* (D. C. Neb., 1948), 76 Fed. Supp. 57; *American Foman Co. v. United Dyerwood Corporation* (D. C. N. Y., 1940), 1 F. R. D. 242.) With this possible basis for jurisdiction eliminated, the Radkovich cross-claim must depend upon being ancillary to the first phase of the Westinghouse action (*Westinghouse v. Radkovich and Radkovich Sureties*), which is based upon the Miller Act.

c. The Radkovich Cross-claim Is Not Authorized by Rule 13.

The meaning of the phrase "arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim" as used in Rule 13(g) is indicated by the Revisory Committee note regarding the 1948 amendment to this section which added the words "or relating to any property that is the subject matter of the original action." The note referred to reads as follows:

"Subdivision (g). The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of rule 13 (g)."

As to this same matter, Barron and Holtzoff say at page 777, that this amendment permits cross-claims "which obviously are as closely germane to the action as

if they arose out of transaction or occurrence upon which the action is predicated.” At page 776, the same authors say:

“A defendant may assert a cross-claim against another defendant, provided it arises out of the plaintiff’s claim or a counterclaim.”

Applying the rule to our case it is apparent that the *transaction or occurrence* which is the subject matter of the original action is that which created the obligation of the defendants (Radkovich and Radkovich Sureties) on the Miller Act bond. The cross-claim relies upon the subcontractor’s bond or bonds which were supplied pursuant to independent contract the obligation of which is independent of the prime contract and its requirement for a bond to comply with the Miller Act.

In point of time the prime contract was entered into before Woolley the subcontractor had even met Radkovich. In other words the cross-claim arose out of an entirely different transaction or occurrence than the one which gave rise to and is the subject matter of the original claim. Subdivision (h) of Rule 13 is dependent upon (g) for it merely authorizes the bringing in of a third party when necessary to grant complete relief upon a cross-claim authorized by (g). The upshot of this is that Rule 13 does not authorize the cross-claim in this case. The Radkovich cross-action must be authorized by Rule 14 if it is authorized at all.

d. General Limitations of Ancillary Jurisdiction.

Rule 13(h) specifically qualifies the bringing in of third parties authorizing such joinder only when it “will not deprive the court of jurisdiction of the action.” Rule 14 is similarly qualified. Rule 82 contains a general

limitation upon interpretation of the rules as follows, quoting the rule in its entirety:

“Rule 82. Jurisdiction and Venue Unaffected.

“These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. As amended Dec. 29, 1948, effective Oct. 20, 1949.”

Accordingly the question of whether a District Court has jurisdiction is governed by principles which are independent of the rules. (*American Foman Co. v. United Dycewood Corporation* (D. C. N. Y., 1940), 1 F. R. D. 171.)

The District Courts have taken jurisdiction over counterclaims and cross-claims where such claims could not have been originally brought as independent actions in the federal court because they lack the necessary jurisdictional basis, such as a federal question or diversity of citizenship. These courts have held that the settlement of such matters as are presented by counterclaims and cross-claims is incidental to the determination of the original controversy. The general principle is that if the dog is to be let in, his tail must come along as well. An example of this situation is *Millsap v. Lotz* (D. C. Mo., 1951), 11 F. R. D. 161.

The true cross-claim and compulsory counterclaim have been recognized as ancillary to the main action. Barron and Holtzoff in volume 1 of Federal Practice and Procedure (Rules Edition), commencing at page 781, point out:

“A counterclaim or cross-claim arising out of the transaction or occurrence that is the subject matter of the original action or counterclaim therein, or

relating to property that is the subject matter of the original action, may be adjudicated even though independent grounds of federal jurisdiction do not exist. This is no departure from former decisions of the Supreme Court. It was long the rule in equity practice.”

But they further state, commencing at page 783:

“The law is otherwise with respect to permissive counterclaims.

“A permissive counterclaim must be supported by independent grounds of federal jurisdiction. *Cross-claims wholly independent of the main issues of the original action are not authorized by the rules and there is no basis for asserting ancillary jurisdiction with respect to them.*” (Emphasis added.)

To bring in Glens Falls, it is necessary to rely upon Rule 14(a). This rule authorizes impleading a third party who is to be referred to as a third party defendant. The moving party to such a proceeding is to be known as a third party plaintiff and his pleading is a third party complaint. This type of impleader should be distinguished from the cross-claim authorized in Rule 13. Unless this distinction is borne in mind, application of the various cases will not be clearly and easily understood. The Radkovich cross-claim has been misnamed. The parties should be known not as cross-claimant and cross-defendant as denominated, but as third party plaintiff and third party defendant. Appellant Glens Falls asserts that the Radkovich cross-claim is an attempt at impleader which is wholly independent of the issues of the original action

and that there is no basis for asserting ancillary jurisdiction with respect to it. See 45 Yale L. J. 393, 420.¹

e. Specific Limitations of Ancillary Jurisdiction in Cases Brought Under the Miller Act.

Actions brought pursuant to authorization of the Miller Act which requires neither diversity of citizenship nor a specific amount in controversy are to be distinguished from the diversity cases because of the different character of the action, not because different principles apply. Reasoning consistent with the foregoing principles moved the court to permit a compulsory counterclaim where the main action was brought under the Miller Act in *United States v. Silken* (D. C. N. D. Ohio, 1943), 53 Fed. Supp. 14.

The reason for this is quite obvious. A subcontractor sued a prime contractor and his surety under the Miller Act. The contractor counterclaimed to set off against the plaintiff's claim a breach of contract by the subcontractor. Of course, if the counterclaim were successful, it would defeat the plaintiff's recovery under the Miller Act and so was directly concerned with the subject matter of the original action. Any possible recovery on the counterclaim over and above the amount set off against the plaintiff's claim was strictly incidental. It was consequently held to be ancillary.

These principles are exemplified in *United States v. John A. Johnson* (D. C. D. Maryland, 1945), 65 Fed.

¹"In the small number of reported cases that have thus far dealt with the impleader of third persons to answer a claim of indemnity or contribution by a defendant, it has been uniformly held that the impleader is not available unless grounds for jurisdiction, independent of the main action, support the claim against the third person."

Supp. 514, where in the absence of independent grounds of jurisdiction the court refused to entertain a counterclaim for damages by the subcontractor against the contractor in an action originating under the Miller Act because the claim was not based upon supplying labor or materials to the contract, and had no effect upon any claim to recovery on the bond. This case is consistent with *United States v. American Surety Co. of New York* (C. C. A. 2d, 1944), 142 F. 2d 726, which was thoroughly discussed in the case last cited.

Beyond this point no court has gone in any case involving the Miller Act. The reason is that the subject matter of a Miller Act case is the bond. To permit the joinder of any claim which has no independent jurisdictional basis would be to construe Rule 13 or 14 to extend the jurisdiction of the United States District Courts in violation of Rule 82 which is the governor upon the interpretive machinery.

The courts have so held. We quote from *United States v. Biggs* (D. C. E. D. Ill., 1942), 46 Fed. Supp. 8, an opinion written by the Honorable Walter C. Lindley who since writing the opinion as a District Judge has become Circuit Judge in the Seventh Circuit. He bases his decision upon an opinion written by Circuit Judge William Denman with Circuit Judges Curtis D. Wilber and Clifton Mathews concurring. Quoting from pages 11 and 12 of the opinion:

“Further, an examination of the Miller Act, 40 U. S. C. A. Section 270a et seq., indicates that the sole purpose of the Act is to protect the subcontractor, and not to provide a basis for recovery between the contractor and a third person. In Seaboard

Surety Co. v. United States, 9 Cir., 84 F. 2d 348, 350, the court, speaking of the scope of the Heard Act, 40 U. S. C. A. Section 270, the predecessor of and substantially the same as the Miller Act, said: 'It is our opinion that the statute upon which the United States brings suit on behalf of the suppliers of labor and material to the principal contractor does not contemplate anything more than adjudicating the obligation to such suppliers flowing from the bond given by the principal contractor and his surety. While the statute must be liberally construed for the purpose of protecting the claims of such suppliers, *Fleischmann Const. Co. v. United States to Use of (G. W.) Forsberg*, 270 U. S. 349, 46 S. Ct. 284, 70 L. Ed. 624, liberality of construction for their protection does not warrant an expansion of adjudicatory power to include controversies between other parties. It is a statutory remedy and gives no equitable jurisdiction whatsoever. So far as the statute contemplates a single action in which there may be tried the several causes of action of these suppliers, it is not designed to avoid a multiplicity of suits beyond the area of these suppliers' causes of action.'

Inasmuch as the proceedings is statutory in character and vests in the District Court no general jurisdiction as in equity or law, but only jurisdiction over certain specified claims, Rules 13 and 14 have no application and counterclaims against the United States no place in the picture. To permit the claim against the United States would be to render an affirmative judgment against the United States on a counterclaim which, in the light of prevailing reasoning, is no part of the statutory proceedings. *United States v. Shaw*, *supra*; *United States v.*

Nipissing Mines Co., supra; United States v. Eckford, supra . . .

The refusal of defendant's counterclaim does not do violence to the rules of Civil Procedure, since authority to make rules of procedure for the exercise of jurisdiction does not enlarge jurisdiction. United States v. Sherwood, 312 U. S. 584, 589, 61 S. Ct. 767, 85 L. Ed. 1058. In fact, Rule 13(d) expressly states that counterclaims against the United States will not be allowed beyond the limits fixed by law."

The Heard Act was the predecessor to the Miller Act and the appropriate section was 40 U. S. C. A. 270. The character of the action therein authorized is indistinguishable from the character of the action authorized by the present law. The cases decided under the Heard Act concerning the nature of the action therein authorized are therefore authority for the same proposition under the Miller Act.

We refer to certain cases on this subject which were decided before the adoption of the new federal rules, but all of these cases go to the question of jurisdiction rather than procedure. The new rules do not enlarge the jurisdiction of the District Courts and consequently do not qualify the controlling principles of these cases.

Quoting from *United States v. Landis & Young* (D. C. W. D. La., 1936), 16 Fed. Supp. 835:

"This proceeding was filed under the Heard Act, 40 U. S. C. A., Section 270. The defendant contractor, Landis & Young, intervened and seeks judgment against one of its subcontractors and the surety on the latter's bond for an alleged overpayment. The subcontractor and its surety have moved to

dismiss the intervention for the reason that such demands cannot be liquidated here.

As pointed out by this court in *United States ex rel. General Iron Works v. Maples et al.*, 6 F. Supp. 354, and *United States ex rel. Buckelew Hardware Co. v. Union Indemnity Company*, 6 F. Supp. 360, in a proceeding of this kind only claims against the funds due by the government to its contractor and upon the bond of the latter can be litigated; it is in the nature of an action in rem as to those funds and upon that bond, which cannot have ingrafted upon it claims against the sureties of subcontractors. If a claimant for material or labor intervenes, then I see no reason why either the general contractor or a subcontractor may not answer and contest the correctness of such claim, pleading credits or offsets thereto for the purpose of establishing the just amount due the claimant; but, as to all demands by the contractor against subcontractors and their sureties, the same are relegated to an independent proceeding.

For the reasons assigned, the motion to dismiss should be sustained.”

The principal application to the issue under discussion is well defined in the following quotation from *United States ex rel. General Iron Works Co. v. Maples* (D. C. W. D. La., 1934), 6 Fed. Supp. 354, at p. 358:

“This is a statutory proceeding (Title 40, §270, U. S. C. [40 U. S. C. A., §270]) upon the bond required to be given to take the place of the lien which the furnishers of labor and material would have against the work in the case of a private individual. There can be no lien upon government property, and it cannot be sued without its consent.

Anyone having a claim against the contractor with the government, after certain delays and after its failure to sue, may proceed in the name of the United States upon the bond which the law requires the government to exact in letting public works. It provides that there shall be but one suit, and 'any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work' may sue or intervene in the proceeding after it has been instituted, regardless of the amount of the claim. It cannot be commenced until after the completion of the work and final settlement by the government, and then not later than one year thereafter. 'If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery.' The fact that it is required to be brought in the name of the government carries the idea that the claimants authorized to sue on the bond shall, in effect, occupy the position of the United States, if it were compelled to pay the furnisher of labor and materials to discharge a lien. In other words, it substitutes them in place of the government, and reasonably contemplates that the proceedings shall be limited to and determined by the rights of all parties in and under the bond or obligation given to the United States. To this extent it is in the nature of a proceeding in rem on the bond. To ingraft either a contractual or legal claim or controversy between these claimants and a third person, such as the surety on a subcontractor's bond, who has voluntarily appeared or under process been brought into the matter, and as to whom the government has no interest and is not privy, would, I think, go beyond the purpose of the law and bring in persons and parties who could not otherwise, because of citizenship, etc., be sued in

this court, under the limited jurisdiction conferred by this statute. I see no reason why anyone having claims which, but for the fact that those were public buildings, would have had a lien thereon, may not avail himself of the benefits of the statutory bond, but, as to those bonds given by subcontractors to persons other than the government (which are not required by law), claimants are relegated to the normal remedies and proceedings which exist in suits to which the government is not a party.”

To restate the general principle which we have seen is applicable specifically to the Miller Act cases, we quote from Vol. 1 Federal Practice and Procedure by Barron and Holtzoff, page 858:

“The claim against the third-party defendant must be that of the original defendant, but it must be based upon the plaintiff’s claim against the original defendant.”

An agreement of indemnity between Radkovich as obligee and Glens Falls and Woolley as obligors is in its nature entirely separate and apart from the subject matter of the original action.

f. The Radkovich Cross-claim Is Not Authorized by the Rules.

We wish to make one further point. We will show below that the Radkovich cross-claim fails to state a claim upon which relief can be granted for the reason, among others, that it does not appear from the cross-complaint that if a judgment is rendered in favor of Westinghouse against cross-claimants Radkovich and Radkovich Sureties the cross-defendants Woolley and Glens Falls will be or might be liable to cross-claimants for any or all of it. Under such circumstances, the cross-claimants have not

brought themselves within the compass of Rule 14 and therefore the attempt at impleader is not authorized by the rules at all.

2. The Cross-claim of Radkovich and Radkovich Sureties Fails to State a Claim Upon Which Relief Can Be Granted.

This point was raised by special defense in the answer of Glens Falls [Sixth Affirmative Defense, R. 40], but was given only perfunctory consideration by the trial court [Memorandum of Conclusions, R. 127, and if mentioned at all in the Findings or Conclusions, by the last sentence of the Findings, R. 201].

a. The Radkovich Cross-claim Omits Any Allegation of Liability or From Which Liability May Be Inferred.

The Radkovich cross-claim appears at page 18 of the record. The substance of the claim consists of the following allegations:

Paragraph VII [R. 20]—Radkovich was awarded the contract for the construction of temporary family quarters at Muroc Army Air Field by contract dated June 19, 1947.

Paragraph VII [R. 21]—Radkovich Sureties furnished a standard form payment bond pursuant to the Miller Act providing that unless Radkovich should promptly pay all persons supplying labor and materials in the prosecution of the work, the obligation of the sureties will remain in force. Radkovich joined in the execution of the bond as principal.

Paragraph IX [R. 22]—Radkovich performed the contract and in the performance employed Woolley as electrical subcontractor.

Paragraph X [R. 23]—Glens Falls executed and delivered to Radkovich a payment bond by which it agreed that unless Woolley would indemnify and hold Radkovich free and harmless from and against all loss and damage by reason of his failure to pay persons supplying labor and materials used in the prosecution of the work provided for in the subcontract, then the bond would remain in full force and effect. Glens Falls also delivered a performance bond conditioned upon full performance of the subcontract by Woolley.

Paragraph XI [R. 25]—Woolley entered upon performance of the subcontract and installed certain electrical equipment purchased from Westinghouse Electric Supply Company, but failed to pay the whole purchase price, leaving a balance due to Westinghouse. This paragraph also contains an averment that Radkovich still owes \$16,562.54 to Woolley which is the unpaid balance of the subcontract price.

Next follows the prayer asking that if Westinghouse obtains a judgment against Radkovich and Radkovich Sureties that they have judgment over against Glens Falls and Woolley for any amount in excess of the balance of the purchase price.

To summarize, Radkovich and Radkovich Sureties show grounds for their liability to Westinghouse and state that Woolley put up a performance bond and a payment bond to Radkovich. This is all that is said. There is no causal connection between these facts and the demand of the prayer. There is no statement to the effect that cross-complainants are entitled to any relief based upon Woolley's bonds.

The numbered paragraphs following in this point specifically detail the defect as it applies to the performance

bond and to the payment bond and point out that this is a defect going to the merits, and is not just a technical defect. It may be said, however, that such a causal connection is required by Rule 8(a). In other words, no circumstances are alleged which show a right of recovery. The rules require a short plain statement of the claim showing that the pleader is entitled to relief. The Radkovich cross-claim contains no statement of any kind showing that the pleader is entitled to relief. This element cannot be omitted.

See *Patten v. Dennis* (C. C. A. 9, 1943), 134 F. 2d 137, wherein the court affirmed a judgment of the District Court dismissing the action for failure to make a plain statement showing that the pleader was entitled to relief. The court said at page 138:

“The requirements of a complaint may be stated, in different words, as being a statement of facts showing (1) the jurisdiction of the court; (2) ownership of a right by plaintiff; (3) violation of that right by defendant; (4) injury resulting to plaintiff by such violation; and (5) justification for equitable relief where that is sought. See: *United States v. Humboldt Lovelock Irr. Light & P. Co.*, 9 Cir., 97 F. 2d 38, 42; *United States v. McIntire*, 9 Cir., 101 F. 2d 650, 653. The complaint is completed by a demand for relief.

Regarding the first conceivable cause of action mentioned above, the complaint, even as supplemented by other parts of the record, fails to allege facts showing a violation of any right owned by appellant by Smith, Bogard and Larsen, or that appellant was injured thereby. Smith, Bogard and Larsen are not parties to this case, but since appellant suggests that they be made parties, we have discussed such con-

ceivable cause of action as if they were already parties. So considered, no cause of action against Smith, Bogard and Larsen has been stated.”

See also *Pierce v. Wagner* (C. C. A. 9, 1943), 134 F. 2d 958, where the same principle is enunciated.

The same result was reached in the 8th Circuit. See *Mitchell v. White Consolidated* (C. A. 8, 1949), 177 F. 2d 500. There the court said at page 503:

“That Rule 8(e) authorizes pleading proximate cause as an ultimate fact seems obvious, but the Rule does not alter the substantive requirement that, in Indiana, in an action for negligence, the existence of a causal relationship between the negligence charged and the damage alleged must be shown by averments of fact before the complaint can be said to state a good cause of action. *Baltimore & O. S. W. R. Co. v. Burtch*, 192 Ind. 199, 134 N. E. 858; *Indianapolis Abattoir Co. v. Neidlinger*, 174 Ind. 400, 92 N. E. 169. See also 45 C. J. 1093 and cases there cited. We find no such causal relationship in the averments of the complaint now before us.”

And further on the same page:

“Defendant’s duty was to protect the public against obstructions, barricades, or other dangerous conditions created by it in the performance of its work as a contractor, 43 C. J. 1113; the extent of this duty and the manner in which it was to be discharged were clearly set forth in the Indiana statute, Sec. 36-1605 et seq., *Burns’ Ind. Sts.* 1933, and it is upon a violation of that statutory duty that plaintiffs’ action must stand or fall. No averments of the complaint express or imply any other fact out of which it can be said that the injuries complained of arose. Plain-

tiffs' claim discloses no causal relationship between the failure to have a red light and the injuries to plaintiffs."

As in Indiana, California requires that a causal connection appear and that all the elements necessary to show a right to relief appear. This is so fundamental that it has required no more than passing comment. We quote from 21 Cal. Jur. 59:

"Every complaint should be founded upon a theory under which the plaintiff is entitled to recover, and should state all the facts essential to support such theory. The complaint should state every fact which, if controverted, the plaintiff will be compelled to prove in order to maintain the action."

In *Quilty v. United Fruit Co.* (D. C. N. Y., 1946), 6 F. R. D. 216, it was held that a third party complaint which was so lacking in details as to necessitate recourse to the principal complaint was subject to dismissal. Even reference to the Westinghouse action does not cure the defect of the Radkovich cross-claim. In the case of *Oppenheimer v. F. J. Young & Co.* (D. C. N. Y., 1943), 3 F. R. D. 220, at 226, the judge expresses his opinion on the rule as follows:

"There is another aspect: It strikes me that the requirement in rule 8(a)(2), that a complaint show 'that the pleader is entitled to relief,' is infringed by omission from the amended complaint of any material portion of what the pleader relies on."

The 7th Circuit points out the deficiency of a complaint in a manner which illustrates the defects in the cross-claim presently before the court, in *Pelelas v.*

Caterpillar Tractor Co. (C. C. A. 7, 1940), 113 F. 2d 629, 631:

“Rather it was an action for money had and received, and in order to constitute a valid cause of action, it was essential that it disclose something in the relationship between plaintiff and defendant, either under an express contract or under facts raising an implied contract, whereby it could be said, as a matter of law, that defendant had received money which it should and was legally bound to pay to plaintiff. . . .”

We omit from the quotation commenced above the court's statement of what the complaint before it averred. The paragraph is concluded as follows:

“There was, therefore, before the court nothing in the way of facts pleaded, by virtue of which it would be said as a matter of law that defendant owed plaintiff anything.”

And further in the opinion, the court made the following statement at page 632:

“The court rightfully held that before plaintiff could recover, it was necessary for him to show by some contract either express or implied, a liability upon the defendant to pay plaintiff. Failing to do so, the complaint was fatally defective.”

This same interpretation of Rule 8(a) appears in *Caribe Candy Co. v. Mackenzie Candy Co.* (D. C. N. D., Ohio, 1948), 78 Fed. Supp. 1021, 1022, as follows:

“The Federal Rules extend the utmost liberality to litigants with respect to forms of pleadings and require only ‘short plain statements’ of their causes of action. Rule 8(a), 28 U. S. C. A. following section 723c . . . The Rules should not be so liberally

construed that a plaintiff may merely hint that he is alleging breach of contract without actually making such an allegation.

Defendant's motion to dismiss will be granted (without prejudice) on the ground that the complaints (both original and supplemental) fail to state of claim upon which relief may be granted."

We turn now to specific defects of the complaint which should be considered in the light of the authorities above cited.

- b. **No Right to Recovery Under the Performance Bond Either Appears or Can Be Inferred Because (1) There Is No Allegation That Radkovich Complied With the Subcontract or That Woolley Failed to Perform, and (2) There Is Neither Allegation nor Excuse for Non-performance by Radkovich of Express Conditions Precedent Contained in the Performance Bond.**

The allegations of the complaint referring to the performance bond [R. 24] show that the bond would be void if the principal, Woolley, shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of the subcontract and of any and all duly authorized modifications of said subcontract. There is no allegation in the cross-claim that the said terms of the performance bond were not fully met by Woolley and, therefore, from all that appears in the complaint the obligation would be of no force and effect and cross-complainants have shown no right to recover thereunder.

While the foregoing observation should be sufficient to defeat any attempt at recovery on the cross-claim as stated in the pleading itself, there are other conditions actually contained in the performance bond which were not men-

tioned by the cross-claim. The performance bond in its entirety appears in the record as Exhibit B of the answer of Glens Falls, commencing at page 50 through page 54, wherein it appears that the bond was executed upon certain conditions precedent to the right of recovery by Radkovich [R. 52]. We mention these conditions precedent because of the relationship of Rule 15(b) to the presentation upon appeal of the objection that the cross-claim does not state a claim upon which relief can be granted.

The record discloses that while Glens Falls urged the conditions precedent as affirmative defenses to recovery on the cross-claim, the issue cannot be considered to have been litigated since the court has made no finding of fact or conclusion of law with respect to the performance of the conditions precedent by Radkovich or of the compliance by Radkovich with terms of the subcontract or excuse for non-performance by Radkovich of either the terms of the subcontract or of the express conditions precedent contained in the performance bond.

c. No Right to Recovery Under the Payment Bond Appears Because There Are No Allegations of Loss or Damage Having Been Suffered by Cross-claimants Radkovich and Radkovich Sureties.

The allegations concerning the execution and contents of the Woolley-Glens Falls payment bond are contained in paragraph X [R. 23] of the cross-claim wherein it affirmatively appears:

“ . . . it is agreed that if the principal shall indemnify and hold the said obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay all persons supplying labor and materials used in the prosecution of the work

provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.”

In paragraph XI [R. 25] it is alleged that Woolley failed to pay Westinghouse but there is no allegation that cross-claimants or either of them sustained any loss or damage by reason thereof.

The payment bond is an indemnity bond against loss or damage as defined in California Civil Code, Title XII. Section 2778 of said title provides rules for interpreting an agreement of indemnity and distinguishes between indemnity against liability and indemnity against claims or demands for damages or costs. As to the latter, Section 2778 says:

“In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: . . .

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified *is not entitled to recover without payment thereof; . . .*”
(Emphasis added.)

It is therefore apparent from the plain and unequivocal language of the Civil Code that the payment bond cannot be the basis for recovery by cross-claimants until cross-claimants are able to allege that they have paid the claim of Westinghouse. Since it appears neither from the cross-claim that such payment has been made nor from any place in the entire record that such payment has been made, the cross-claim is fatally defective in this respect.

Moreover, for the reasons just stated, it is obvious that the issue has neither been raised nor litigated in the course of the trial.

That the law of the State of California is, as plainly stated in the Civil Code, is apparent from the case of *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 688, 33 P. 2d 433, from which we quote commencing at 138 Cal. App. 688:

“In 13 California Jurisprudence, page 987, the distinction between a bond against liability and an indemnity contract against loss or damages is clearly enunciated. We quote therefrom: ‘The distinction between an undertaking against “liability” and the strict contract of indemnity against “loss” is that between contracting that an event shall not happen, and contracting to indemnify against the consequences of the event if it should happen. A liability is not a damage, according to the signification of that term as employed in contracts of indemnity, and it has been said that courts have no authority to insert the term “liability” in a contract, and then proceed to enforce the contract as they—but not the parties—have made it. A bond indemnifying a person against loss and liability takes effect from its delivery, and its legality is to be determined by reference to the state of things then existing.’ And then, on page 991 of the same volume, section 12, the rule is clearly stated that the right of action upon a bond indemnifying against loss or damage accrues only, and at the time when the indemnitee suffers actual loss by being compelled to pay, and the actual payment of damages. The authorities cited in the footnotes so fully support the text which we have quoted that further attempts to distinguish between a bond insuring against liability

and one insuring against loss or damages is unnecessary. *Nor is it necessary to cite further authorities that before an action can be begun upon a contract of indemnity insuring against loss or damages the damages must have been paid as required by subdivision 2 of section 2778 of the Civil Code.*" (Emphasis added.)

We respectfully represent that not only has no allegation been made which is sufficient to state a claim relying upon the payment bond, but we assert, and it appears to be obvious, that no such allegation could have been made during the course of these proceedings. It is a matter of interest to note that in order to state a claim under the payment bond, it would be necessary for the cross-claimants to make payment to Westinghouse. Then the Westinghouse action would no longer present a justiciable issue and the cross-claim which is dependent for jurisdiction upon being ancillary to the main action would have to be dismissed for lack of jurisdiction.

d. The Issues Not Raised by the Pleadings Were Not Litigated so as to Cure the Defects in the Pleadings Pursuant to Federal Rules of Civil Procedure, Rule 15(b).

We are not unmindful of the provision of Rule 15(b):

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”

We have, however, pointed out above in respect to each specification of deficiency in this pleading that the issues not raised by the pleadings were not litigated in the course of the trial. To summarize the defect in this cross-claim, it fails to present any controversy.

3. Recovery Cannot Be Predicated Upon the Payment Bond Because Radkovich, the Obligee, Produced No Evidence That He Suffered Any Loss or Damage.

This point is responsive to Points on Appeal 3-A [R. 530] and Specification of Error Relied Upon listed under Point V-2 of this brief which specifications of error are the same as the points on appeal. It has already been pointed out that the payment bond is an indemnity bond and that under California Civil Code, Section 2778 and the authority of *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 33 P. 2d 433, the person indemnified is not entitled to recover without payment of the loss or damage indemnified against.

We have also pointed out that the cross-complaint is fatally defective for failure to allege payment by Radkovich of the loss or damage against which the bond indemnifies Radkovich. Not only is this true, but the record discloses not one bit of evidence of such a payment. As a consequence, cross-claimants have failed to prove a right to relief and have failed to establish any legal right to recovery.

In the face of this complete failure of proof, the court concluded in Conclusion of Law II [R. 201] that Radkovich and Radkovich Sureties are entitled to judgment against Woolley and Glens Falls in the same total sum of principal and interest to which Westinghouse was adjudged to be entitled and the judgment against Woolley and Glens Falls was based directly upon this Conclusion of Law.

There is no finding of fact made by the court to support Conclusion of Law II and, therefore, Conclusion of Law II is unsupported by the findings and the evidence.

Appellant is entitled to a finding or findings of fact which will sustain a conclusion that cross-claimants are entitled to judgment.

Rule 52(a) provides that the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. It also provides:

“If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.”

There was in this case no opinion or memorandum of decision such as contemplated in Rule 52.

The *Memorandum of Conclusions* [R. 91-151] in this case was dated September 26, 1951, and accompanied by a Minute Order of the same date [R. 151] directing the preparation of findings, conclusions and judgment by counsel. Four months later, findings, conclusions and judgment were prepared by the court and signed February 7, 1952 [R. 193-205].

During the interval between the date of the memorandum and Minute Order and the signing of the findings, conclusions and judgment, there were drafted and submitted proposed [R. 156] and second proposed [R. 177] findings of fact and conclusions of law and eight letters were exchanged between various counsel and the trial judge. Thereafter, under date of February 7, 1952, a further *Memorandum Re Proposed Findings, Conclusions and Judgment and Objections Thereto* [R. 152-155] was prepared by the court, clearly indicating that the original memorandum was subject to correction and was to be used as a basis for preparation of the findings, conclusions and judgment, but was not intended as a substitute therefor.

It further appears that the court reserved a right to alter his opinion with respect to the various matters covered therein. The last memorandum was in the nature of an explanation and disposition of counsel's correspondence. These memoranda do not have finality and conclusiveness of a memorandum of decision such as mentioned in Rule 52(a).

Barron and Holtzoff in Volume 2 of Federal Practice and Procedure, page 828, say:

“Statements in an opinion which is not regarded or intended as embracing findings of fact and conclusions of law cannot control, modify or impeach the findings or decision.”

And cite:

American Insurance Co. v. Lucas (D. C. Mo., 1941), 38 Fed. Supp. 926, appeals dismissed 62 S. Ct. 107, 314 U. S. 575, 86 L. Ed. 466, certiorari denied 63 S. Ct. 257, 317 U. S. 687, 87 L. Ed. 551.

It is nevertheless worthy of note that the *Memorandum of Conclusion* of the trial court [R. 91-151] contains no statement which in any way intimates the existence of any fact which might be considered to support the substantive rule of law above stated and which would justify a conclusion of law that cross-claimants are entitled to judgment against appellant.

The appellate court may reverse or vacate a judgment and remand the case for further findings if the trial court fails to make findings of fact as required by Rule 52(a). In the case of *Paramount Pest Control Service v. Brewer* (C. A. 9, 1948), 170 F. 2d 553 at 554, the court said:

“The record before us is devoid of findings of fact upon such essential issues in the suit.

This court of appeals has no power *ab initio* to consider under the record before it the issue of conspiracy or the concomitant claim for damages.”

However, if the record discloses that there is no evidence upon which such a finding can be made, and in addition shows that the circumstances are such that no such finding could be made in the action, particularly without loss of jurisdiction of the entire controversy, the appellate court cannot sustain the judgment, and, we respectfully submit, has no alternative to reversal.

See *Burman v. Lenkin Const. Co.* (1945), 149 F. 2d 827 (80 A. D. C. 125), a *per curiam* opinion in which the court states at page 828:

“We have carefully read and considered the entire record, and while we think it is always desirable, on a trial to a judge without a jury, that the facts should be found to aid us in understanding the basis of the decision, we are nevertheless of opinion that here the record considered as a whole does not present a genuine issue as to any material fact—in view of which it would be both a waste of time and a needless expense to send the case back to the District Court for special findings of fact.”

We have already noted that the express provision of California Civil Code, Section 2778, provides that the person indemnified *is not entitled to recover* without payment of the loss or damage concerning which a claim of indemnity is made and we have pointed out that the courts of California have clearly and unequivocally confirmed this section as the law of California without exception, but we wish to point out in addition that such a result is reasonable and is the result contemplated by the parties to this payment bond.

As pointed out in *Ramey v. Hopkins, supra*, the “courts have no authority to insert the term ‘liability’ in a contract, and then proceed to enforce the contract as they—but not the parties—have made it.” It is the way of the world that in private contracts each party looks only to his own protection and the courts have no authority to extend the risk of contract beyond the terms plainly provided. Consequently, no right of action was alleged, was shown to exist, or was proved, and Conclusion of Law II and the Judgment cannot be sustained based upon the payment bond.

4. Since the Subcontract Was Materially Altered Without the Consent of the Surety, There Can Be No Recovery on the Radkovich Cross-claim Either on the Payment Bond or the Performance Bond.

This point is responsive to Points on Appeal 2-D-b and 3-B-b and to Specification of Error, Point V of this brief, 2-D-b and 3-B-b and Point IV-4 and 5 of Questions Involved.

a. The Rule That Alteration of Contract Without Consent of a Surety Releases the Surety From Liability Is Well Established and Rests Upon Sound Legal Principles.

California Civil Code, Section 2819 reads as follows:

“A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.”

See *Shuey v. Bunnay* (1935), 4 Cal. App. 2d 408, 40 P. 2d 859, wherein the court based its decision upon the

foregoing code section. The court held that a change in a contract, the performance of which was secured by a surety bond, released the surety.

In the instant case there is both a surety bond (the performance bond) and an indemnity bond (the payment bond). But there is no distinction between the two insofar as the application of the foregoing rule is concerned (8 Cal. Jur. 2d 647). An alteration of the contract between the principal (Woolley) and the obligee (Radkovich) releases the surety from liability. See *Josephian v. Lion* (1924), 66 Cal. App. 650, 660, 227 Pac. 204. In that case the court said:

“The authorities are to the effect that the doctrine of exoneration, in equity, applies as well to contracts of indemnity as to those of suretyship.”

The essence of a contract of suretyship and the basis upon which the surety is released from responsibility if the principal and the obligee alter the contract regarding which the surety bond is given is well stated in the case of *County of Glenn v. Jones* (1905), 146 Cal. 518, 520, 80 Pac. 695:

“The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights. He must not omit to do any act required by the surety which duty enjoins him to do, if such omission injures the surety. The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner and

under the circumstances pointed out in his obligation, he is bound, and no father (*sic*). He has a right to stand on its very terms.”

The general principle of good faith and confidence between the parties to act in such a way as to do nothing and omit nothing which might affect the liability of the surety is a general principle of law which is applicable to all contracts of suretyship, including contracts of indemnity, whether they contain express conditions precedent or not.

The denomination of the indemnity bond in this case as the “payment bond,” is not determinative of its character. It must be borne in mind that the payment bond is provided pursuant to contract and is what is termed a “common law bond” as distinguished from a “statutory bond.” The fundamental distinction between the two is that statutory bonds denominated payment bonds are provided pursuant to a statute, the declared purpose of which is to protect the rights of third parties. The law requires that a bond furnished pursuant to statute comply with the purpose of the statute. The provisions of the statute will be read into any bond furnished in compliance therewith so as to make the contract a third party beneficiary contract available to suppliers of material or labor when the statute so provides, regardless of the provisions of the bond itself. In the instant case, the payment bond is limited by its own terms and is not governed by the statute.

The performance bond is similarly governed exclusively by its own terms rather than by statute. It was not furnished for the benefit of third parties, but was expressly furnished for the benefit of Radkovich exclusively.

We quote from the bond appearing at page 53 of the record:

“No right of action shall accrue under this bond to or for the use of any person other than the Obligee named herein.”

The only obligee named in the bond is Radkovich.

The payment bond is similarly conditioned since by its terms it runs to Radkovich as the obligee and as already observed contains the following provision, quoting from page 50 of the record where a copy of the bond appears:

“Now, Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation be null and void, otherwise to remain in full force and effect.”

The clear intent of this provision is to provide a bond for the protection of Radkovich only. Moreover, when read in connection with Civil Code, Section 2778, Subsection 2, it is clear that the law gives full weight to this intention.

As a consequence, this common law payment bond is an indemnity bond for the protection of the obligee only. We call attention to this fact in order to avoid any confusion with cases interpreting statutory bonds which are ultimately governed primarily by the provisions of the statute rather than by the terms of the bond and in the usual case arise through the suit by a third party who seeks compensation for materials or labor supplied and not paid for. In such circumstances, since the plaintiff in

such an action is not a party to the contract concerning which the bond was posted, the matter of alteration of the contract between the principal and obligee is immaterial. But with such interests eliminated, it is only just that he who seeks to take advantage of the protection afforded by the bond must conduct himself in such a way as not by his own act to contribute to the risk of a surety.

Where a performance bond is involved containing express conditions precedent to recovery, those conditions are given full weight and force and if they have not been complied with the surety is exonerated from any liability to the obligee. We mention two California cases of importance in this connection, the decisions of which enunciate the principles above expressed. First is *Roberts v. Security T. & S. Bank* (1925), 196 Cal. 557, 564, 238 Pac. 673, in which case the court declared:

“No principle of law is perhaps better settled than that the liability of a surety is not to be extended by implication beyond the express terms of his contract. (Civ. Code, sec. 2836) It is also the law that when the undertaking is to assure the performance of an existing contract, if any change is made in its requirements in matters of substance without the consent of the surety, his liability is extinguished.”

The second case is *First Congregational Church v. Lowrey* (1917), 175 Cal. 124, 126, 165 Pac. 440, wherein the court expressly refers to Section 2819 of the Civil Code above quoted, saying:

“Section 2819 of the Civil Code provides that a guarantor ‘is exonerated, . . . if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in

any respect.' (See, also, Civ. Code, sec. 2840, applying the same rule to sureties.) Our decisions construing these sections uniformly hold that if there has been such a change in the contract in any (material) respect, the inquiry there ends, and the guarantor is exonerated, and that it is not a subject of inquiry whether the alteration has or has not been to his injury."

An alteration of contract such as will exonerate a surety may be by oral or written agreement. There was no written alteration of contract involved in the instant case. It is contended, however, by appellant that the subcontract was altered by oral agreement in several respects.

California Civil Code, Section 1698, reads as follows:

"(Written contracts, how modified.) A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

As we will hereafter show, the subcontract has been altered by executed oral agreement. We will also point out that in the circumstances of this case Radkovich is estopped to deny the alteration of contract. We further contend that a change in the performance of the subcontract obtained by economic stress is a lack of good faith which in the light of the principles above set forth exonerates Glens Falls from any liability to Radkovich and consequently to Radkovich Sureties.

When we speak of alteration of contract, we mean, of course, alteration of contract without the consent of the surety. There is nowhere in the record any evidence that Glens Falls was notified of or consented to the alteration of the subcontract between Radkovich and Woolley.

The specific application of the foregoing principle will be taken up under separate heading relating the facts to the law.

b. The Subcontract Was Altered When Radkovich Required Woolley to Perform Work and Furnish Materials Which Were Not Within the Scope of the Subcontract or Any Authorized Modification Thereof.

At the inception of the subcontract Woolley reported to the superintendent on the job as he was instructed to do by Radkovich and reported to Barrington's office to arrange for location changes to correspond with certain practical details of construction and his suggested revisions were referred to the Radkovich office for processing through the office of the United States Engineers.

On or about the same day that Woolley's crew first appeared on the job and commenced work, Woolley was handed a new drawing which was the Revised Electrical Plan mentioned in the facts. This drawing showed substantial additions to the work shown on the Original Electrical Drawing upon which the subcontract was based. There were four items which from all the evidence were clearly in dispute and for which the court ultimately permitted Woolley to recover—the bell circuits, telephone circuits, closet lights and fixtures.

As soon as Woolley obtained this plan he went immediately to see Radkovich, checked with the engineers and upon learning that the engineers would insist that these items be included in the contract and that the engineers refused to discuss payment for such items, he returned to see Radkovich and had a discussion, the details of which are particularly set forth in the facts above. In substance, Radkovich told Woolley to go ahead with the

wiring according to the Revised Electrical Plan, he acknowledged that the additional items were not on the Original Electrical Drawing and that Woolley would be entitled to additional compensation for this extra work. At this time the discussion was limited to the first three items and did not concern fixtures.

After the engineers approved the Revised Electrical Plan, Woolley commenced work as required by Radkovich and wired the Revised Electrical Plan, installing in each house the additional tubing, outlet boxes, wires and other electrical equipment required by the Revised Electrical Plan [R. 457].

From early October, 1947, to May, 1948, Woolley continued to perform as above set forth. In May, 1948, and not before, Radkovich repudiated his former promise to give Woolley extra compensation for these additional items. *It is our contention that as each unit was wired to this plan, the agreement with Radkovich was fully executed as to such house and that this constituted an executed oral agreement altering the subcontract.* Moreover, appellant contends that by permitting Woolley to act upon his oral promise, Radkovich caused Woolley to substantially change his position to his detriment and that Radkovich is thereby estopped to deny his oral agreement and that the effect thereof is to alter the subcontract with respect to the three items above referred to. It is presumed in law that any alteration of a contract is prejudicial to the rights of the surety, whether or not the alteration is detrimental, but here, such alteration resulted in obvious detriment to the surety.

The argument that the agreement above referred to between Radkovich and Woolley was in effect another contract, separate and apart from the subcontract, is

untenable because the items in question were not separable from the other portion of the subcontract. They all required that electrical conduit be installed upon the forms set up by Radkovich preparatory to pouring the house. It required a rerouting and redesigning of the tubing and outlet boxes originally provided for in the subcontract which, in itself, is an alteration of the subcontract.

While the additional cost of labor and the additional cost of materials might be computed on an over-all basis as a result of the additional items, it would be manifestly impossible to segregate this cost from the standpoint of a separate and independent contract. Moreover, all of the materials which were used by Woolley in the performance of the subcontract, including these additional items, were taken into consideration in making progress payments upon the contract. They were not separated and there is no evidence of any intent to separate the original subcontract from the subcontract as altered by this agreement. It should be observed that the court never tackled the problem here presented in either its Memorandum of Conclusions or Findings of Fact and Conclusions of Law.

That this was one of the major issues of the trial is obvious throughout the transcript of the testimony commencing with the examination of the first witness by Mr. McCall, counsel for Glens Falls, and by Mr. Benedict, counsel for Woolley.

The law on the question of the alteration of a written contract by oral agreement is clear cut. No authority beyond Civil Code, Section 1698, need be cited for the proposition that a contract in writing is altered by an executed oral agreement. Beyond this point in circumstances such as have above been shown to exist in this case,

where a party on the basis of an oral agreement changes his position to his detriment, the other party is estopped to deny the agreement and this, cases hold, is not contrary to Section 1698.

The very late case of *D. L. Godbey & Sons Construction Co. v. Deane* (1952), 39 Cal. 2d 429, 246 Pac. 2d 946, is a case somewhat similar to the one at bar. The Supreme Court of California recognized that cases have held that an oral agreement must be fully performed on both sides to be executed under the meaning of Section 1698 but came to the conclusion that where there was adequate consideration for the oral agreement altering the contract and in which the party relying thereon had fully performed, the contract has been enforced as modified whether or not the other party had performed on his part.

The case above cited concerns a contract which was fully performed by the contractor and points to the fact that failure to pay for the performance by the other party does not prevent the full enforcement of the oral contract.

The problem of estoppel was directly presented in the case of *Penno v. Russo* (1947), 82 Cal. App. 2d 408, 412, 186 P. 2d 452, in which case the court held that where one party to a contract by conduct or representations waived the performance of a condition thereof, he is estopped by such conduct or representations to deny that he has waived such performance.

The case of *Wilson v. Bailey* (1937), 8 Cal. 2d 416, 421, 423, 65 P. 2d 770, is a parallel case with the instant case, the court holding that the party who has permitted the other party to change his position in reliance upon an

oral promise will be estopped to deny the oral modification. We quote from the opinion of the court:

“And likewise, while it is settled in view of section 1698 of the Civil Code which provides that a written contract may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, that a written contract may not be varied or modified by an executory parol agreement, nevertheless, it is also true that the facts of a particular case may give rise to an equitable estoppel against the party who denies the verbal modification.”

And the court further in the opinion says:

“It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove*, 100 U. S. 578, 580 (25 L. Ed. 618) and quoted therefrom in *Carpy v. Dowdell*, 115 Cal. 677, 687 [47 Pac. 695], as follows: ‘The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.’ ”

Upon the authority above cited, we respectfully contend that the subcontract between Radkovich and Woolley was materially altered without the consent of the surety, that such alteration was of a nature to be binding upon both parties thereto, was in part fully executed and enforceable as to the other part, so as to bind the parties to perform the subcontract as altered.

In the foregoing discussion we paused to discuss the law at the point in the facts where Radkovich repudiated

his oral agreement. To continue from that point, it is to be observed from the exhibits which reflect the correspondence between the parties concerning the dispute over the additions to the subcontract and by their conduct thereafter that Radkovich insisted and adhered to his position that Woolley was required to perform the contract according to the Revised Electrical Plan. Radkovich only maintained that Woolley was not entitled to additional compensation therefor.

On the other hand, Woolley was firm in his contention that he was entitled to additional compensation therefor, relying upon the oral promise theretofore made. After Woolley walked off the job and returned, Radkovich not only accepted Woolley's further performance, knowing his contentions, but demanded it, apparently content to leave the matter of additional compensation to be later litigated. We believe that the conduct of the parties was such as to constitute an alteration of the subcontract as to the fixtures.

Radkovich demanded that Woolley return to the job and that he install fixtures, and Woolley was ready and willing to do so contingent only upon additional compensation therefor. By mutual consent the parties agreed to complete the work, each reserving only the issue of compensation. Upon completion of the subcontract by Woolley on October 6, 1948, we believe that Woolley fully performed the subcontract on his part and that it was altered by executed agreement in the total amount of \$8,277.67.

The materiality of change in the Revised Electrical Plan hardly needs to be mentioned because it is quite obviously substantial, the court having found that Woolley was entitled to additional compensation in the sum of

\$8,277.67, which is in excess of 10% of the contract price.

We call the Court's attention to one further point above made, which is that the evidence showed Woolley to be in great financial stress [R. 419 is an example]. He owed Westinghouse a large sum which he had been unable to pay. The payments which he had received from time to time from Radkovich were uncertain and not determinable in advance and it was extremely important that Woolley take such further action as might be necessary to complete the performance of his contract so as to be in a position to compel Radkovich to compensate him in the full amount of his subcontract price plus such additional amount as the alteration might justify.

With full knowledge of these circumstances, Radkovich insisted upon Woolley's return to performance by June 14, 1948, the penalty for not complying with this demand being that Radkovich would complete Woolley's subcontract and charge the cost thereof to Woolley. We represent that this is a form of compulsion by economic stress, which is a lack of good faith between the parties and that the insistence by Radkovich that Woolley perform according to the Revised Electrical Plan which Radkovich had acknowledged contained items not originally contemplated, was such lack of good faith as to be inconsistent with the relationship existing between Radkovich, Woolley and Glens Falls and that Radkovich thereby deliberately jeopardized the surety and increased its risk as a consequence of which Glens Falls should be exonerated from liability to Radkovich.

We again call the Court's attention to the case of *First Congregational Church v. Lowrey* (1917), 175 Cal. 124, 125, 126, 165 Pac. 440, where there were unauthorized

changes in the contract amounting to a total of over \$500.00 extra work. The lower court found:

“That none of such alterations, deviations, or omissions were detrimental to the interests of the defendant, Pacific Surety Company,”

The appellate court held that notwithstanding such finding, Civil Code, Sections 2819 and 2840 “speak with absolute finality upon the subject” and exonerated the surety.

c. The Subcontract Was Altered When Radkovich Paid Woolley Before the Money Was Earned and Payable Pursuant to the Terms of the Subcontract.

As pointed out in the facts the first progress payment made to Woolley was for \$5,000.00. At the same time \$4,000.00 additional was paid to Woolley by the prime contractor. Woolley paid \$500.00 referred to as interest to the prime contractor to obtain the so-called loan of \$4,000.00. In November or December of 1947 the \$4,000.00 was taken out of amounts then admittedly due Woolley [R. 262, 291-292]. Was this in reality a loan or an advance? We believe that it was an advance and the \$500.00 was a discount.

It does not appear that a note was signed by Woolley and Woolley had no control over the matter of repayment. It was taken out of an estimate without consulting Woolley [R. 291-292]. It had originally been agreed that it would be taken out of some future progress payment. Moreover, interest in the sum named for such a short period would unquestionably be void. (*Haines v. Commercial Mortgage Co.* (1927), 200 Cal. 609, 254 Pac. 956, 255 Pac. 805, 53 A. L. R. 725.) The courts

will not construe a contract in a manner to cause any part of it to be illegal or void unless such construction is unavoidable. The actual transaction does not have the characteristics of a loan because repayment was not within the control of the debtor, no time for repayment was specified, no demand was made before withholding and the \$500.00 payment was more in the nature of a discount or agreement to reduce the total subcontract price than an interest payment for the use of money because the use was of unspecified duration.

We think that *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.* (1931), 214 Cal. 384, 5 Pac. 2d 888, is a case very directly in point and controlling. This case held that what was characterized as a loan in parallel circumstances was actually an advance.

Returning to the facts, we find that by executed oral agreement, the subcontract price was reduced by \$500.00 without the consent of the surety. It also appears that Woolley was paid \$5,000.00 plus \$3,500.00 (the \$4,000.00 less \$500.00) or \$8,500.00 on the first estimate. This estimate was based upon materials only.

The second payment was \$15,000.00, making total payments in the sum of \$23,500.00 to date of the second estimate. It appears from Woolley's statements on the occasion of the first and second estimates that the first estimate was duplicated in the second, plus labor and material costs since incurred. So Woolley's second estimate was his total cost to that date, the sum of \$16,551.09, or a difference of \$6,948.91.

Woolley's second estimate listed materials totaling \$13,111.71 [Ex. 13; Nov. 1, 1947, estimate] and \$3,439.38 for labor. Woolley's testimony showed that the \$3,-

439.38 for labor could be supported only to the extent of \$2,774.17 [R. 454], resulting in an overcharge of \$665.21. Also, \$949.22 worth of this total labor charge of \$3,439.38 was non-productive labor [R. 454-455], leaving productive labor of \$1,824.95.

Subtraction of the \$665.21 overcharge reduces Woolley's second estimate from \$16,551.09 to \$15,885.88. With the further subtraction of the \$949.22 of non-productive labor, Woolley's second estimate is finally reduced to \$14,936.66. This figure of \$14,936.66 represents the productive labor and supplies delivered to the job.

Therefore, the overpayment to Woolley was \$8,563.34; *i. e.*, the difference between \$23,500.00, the amount actually paid to Woolley to the date to this estimate, and \$14,936.66, the actual amount of productive labor and materials supplied by Woolley to this date. Note that if 10% of the \$14,936.66 is also deducted as a hold-back, pursuant to the provisions of the subcontract, this \$8,563.34 overpayment, or differential, is increased to an overpayment of \$10,057.00.

As we observed in stating the facts, there is necessarily a close relationship between the actual labor and materials on the job and the progress made. This suggests another comparison. Giving Woolley full credit for the materials in the sum of \$13,111.71, as listed in this second estimate of Woolley's, we have a total productive labor in the sum of \$1,824.95 producing progress in the sum of \$10,388.29 (\$23,500.00 paid less \$13,111.71 of materials). This is so out of balance with reason that we believe that notwithstanding the fact that his progress on the job cannot be determined with mathematical precision, a payment in excess of earnings to the date of the second

estimate is established. Even if this figure is reduced by \$3,500.00, the amount we have added as representing the advance, the earnings of \$1,824.95 worth of labor would be \$6,888.29, which is still unreasonably out of proportion.

It is to be expected that a payment in advance of earnings would result from the duplication of \$9,885.37 worth of materials.

The question simply is, does this exonerate the surety? The case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.* (1931), 214 Cal. 384, 5 Pac. 2d 888, answers this question affirmatively. We quote from page 396:

“In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the \$1,000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found. Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated.”

County of Glenn v. Jones (1905), 146 Cal. 518, 80 Pac. 695 is to the same effect.

d. The Subcontract Was Altered When the Method of Payment Was Changed From a Progress Payment Method of Payment to a Unit Method of Payment.

At the request of Mr. Radkovich, Woolley agreed to change the method of payment from the progress payment method to the unit method of \$390.00 per house. The third estimate was submitted upon this basis, but Mr. Radkovich told Woolley that the prime contractor was in

financial difficulty and asked Woolley to accept \$200.00 per house. Woolley accepted and was paid \$3,000.00 on account of this estimate. Every other estimate presented by Woolley was on this basis.

We believe that this constituted an alteration of the subcontract which releases the surety. We refer the court to *Mundy v. Stevens* (3 C. C. A., 1894), 61 Fed. 77.

e. There Is No Finding Upon the Substantial Question of Alteration of Subcontract and Performance. This Is Reversible Error.

We have above pointed out four separate and distinct alterations of the subcontract and performance which alterations were without the consent of Glens Falls, the surety. We have also cited the law on the question showing that such alterations exonerate a surety from liability on its bond. That such alterations were material was shown. From the statement of facts and from the discussion of the various matters in the court's Memorandum of Conclusions, it appears that all of these contentions were treated as issues at the trial.

Appellant is entitled to a finding of fact upon the material issues of fact thus raised, but there is none. The only findings which might be considered to affect the various contentions are in irreconcilable conflict or are inadequate to settle the issues. In Point 3 of Argument, we have cited authority for the proposition that it is error to omit findings on such substantial and material issues.

The four alterations of subcontract and performance established are:

(1) Additional material and labor were added; (2) The contract price was reduced by \$500.00; (3) Woolley

was paid a substantial sum of money before it was earned; and (4) The method of payment was changed.

The alterations of subcontract and performance above shown are sufficient to indicate that Findings XI, XII, XV, XVII and XVIII are unsupported by the evidence, are conflicting among themselves and with other findings. Reference is made to the Specification of Error for further statement of the conflict existing in the findings.

5. The Judgment Against Glens Falls Cannot Be Predicated Upon the Performance Bond Because Woolley Fully Performed.

The performance bond was given to assure performance and the obligation was to be void if Woolley fully performed. The court found that Woolley did fully perform in Findings XIII and XVI and these findings are in this respect well supported by the evidence and are not contested. Hence Conclusion of Law II is unsupported so far as it relates to the performance bond.

6. Recovery Cannot Be Predicated Upon the Performance Bond Because Radkovich Did Not Comply With the Express Conditions Precedent to Liability of the Surety Specified in Said Bond.

The performance bond [Ex. C] contained the following express conditions precedent to the surety's (Glens Falls Indemnity Company) liability thereon:

“The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified:

“The said Surety shall be notified in writing of any act on the part of said Principal, or its agents

or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, or any representative duly authorized to oversee the performance of said subcontract, and a registered letter mailed to the said Surety, at its principal office in the city of Glens Falls, state of New York, or its Pacific Coast Department in the city of San Francisco, state of California; shall be the notice required within the meaning of this bond:"

No finding was made upon this issue in either phase: (1) Whether Radkovich performed the subcontract as he was required to do and (2) whether Radkovich gave notice immediately after receiving knowledge of circumstances which might involve a loss to the surety.

As to the former there was considerable evidence as to the failure of Radkovich to perform. Note that damages were allowed Woolley by the court for delay caused by Radkovich [Finding XVI]. We have already shown in Argument, Point 4-b that Radkovich enforced a change in the performance by economic compulsion, and in Argument, Point 4-c, by compelling the reduction of the total contract price and paying money to Woolley before it was earned, and in Argument, Point 4-d, by changing the method of payment.

As to the latter, we have pointed out in the facts that the notice required was not given in one instance and 60 days delayed in another. Notice was never given by Radkovich to Glens Falls that Woolley was in financial difficulty [R. 347-348], a fact that came to the attention of Radkovich in September of 1947 when the

first progress payment was due. The advance or loan of \$4,000.00 was made to Woolley at this time, upon Woolley's representation that he could not proceed unless he got \$4,000.00 more at that time. This circumstance directly led to the judgment actually rendered in this case against Glens Falls, for it was Woolley's financial condition that accounts for his failure to pay Westinghouse.

The second instance was when Westinghouse gave notice on April 10, 1948, to Radkovich of Woolley's obligation to Westinghouse. Radkovich failed to notify Glens Falls until June 10, 1948, 60 days later. Surely this is not "immediately."

First, let it be observed that Section 2787 of the California Civil Code abolishes the distinction between a surety and a guarantor. We then turn to the case of *Schwab v. Bridge* (1915), 27 Cal. App. 204, 206, 149 Pac. 603. In construing a guaranty the court said:

"Where a contract of suretyship stipulates that notice shall be given to the surety of the principal's default, failure to comply with the condition or to give notice within the time specified will prevent recovery from the surety."

Union Indemnity Company v. Lang (C. C. A. 9, 1934), 71 F. 2d 901, is the leading federal case on notice. It was decided in this state before the decision of the United States Supreme Court was rendered in *Eric Railroad v. Tompkins* (1938), 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817. However, although the *Lang* case was decided before it became mandatory for the federal courts to follow the state law, that case was decided on the basis of the California state law. The *Lang* case has not been

disapproved by any subsequent decision of the California courts. The court stated the law, on page 906, as follows:

“We believe that the decisions of the highest courts of California have recognized the principle of *strictissimi juris* in connection with notice of default, breach, or any act or omission that might cause a loss for which the surety might become liable, regardless of whether or not the surety has been in fact prejudiced by failure to receive such notice.”

See also:

Bensley v. Atwill (1859), 12 Cal. 231.

7. Cross-claimants Have Failed to Allege and Prove the First Condition Precedent to Recovery Upon the Performance Bond.

The first condition precedent of the performance bond is that Radkovich shall do and perform each and every of the matters and things set forth in the subcontract. This includes payment according to the terms of the subcontract. We have argued and, we believe, have demonstrated that Finding of Fact XVIII is not supported by the evidence in that the evidence shows that Woolley was paid more than was due him at the time of the second progress payment. Notwithstanding this contention, the burden of proof is upon cross-claimants to affirmatively demonstrate that Radkovich paid Woolley according to the terms of the subcontract. Finding of Fact XVIII is to the effect that the evidence is insufficient to establish that Radkovich did pay Woolley in the manner specified by the subcontract. Accordingly, cross-claimants are not entitled to recover because they failed in their proof.

8. No Support Can Be Found for Finding XVIII Because the Evidence Establishes the Special Defenses of the Surety.

We believe that we have established that the subcontract was altered in four ways and that the cross-claim does not state a claim upon which relief can be granted and that in these particulars Finding of Fact XVIII is not supported by the evidence.

9. The Payment Bond and the Performance Bond Should Be Construed Together.

The performance bond and the payment bond were both given for one premium as appears on the face of the bonds themselves. They are for the exclusive protection of Radkovich and neither one is available to third parties. The obligee, Radkovich, owes the duty of good faith and fidelity to the surety and must do everything for the protection of the surety. If Radkovich has seen fit to neglect its duty of good faith and fidelity to the surety, Radkovich is not entitled to hold the surety liable for a risk to which Radkovich contributed. The surety relied upon Radkovich to carry out its obligations under the bonds and intended to take no risk greater than its bond specifically covered. Since the violation of provisions of the performance bond was such as to prejudice the risk taken by the surety, the surety should be exonerated.

10. **The Court Erroneously Granted Judgment Against Glens Falls for the Full Amount of the Westinghouse Judgment Which Included Not Only Obligations Assessable Against the Subcontract, but Extras as Well.**

While we have contended that the items referred to in Finding XV were all included in the subcontract by alteration thereof by Woolley and Radkovich without the consent of Glens Falls, in the event that it should be considered that the items in Finding XV are not included in the subcontract, the court has granted a judgment which exceeds the liability of Glens Falls.

As we have demonstrated and as Woolley testified, the supplies obtained from Westinghouse by Woolley went into the subcontract and into the installation of phone circuits, chime circuits and closet lights. If these items are not a portion of the subcontract, then Glens Falls has been held liable for the cost of materials which were not used in the performance of the subcontract for which the bond was furnished. For this reason, there is no alternative to reversal.

Conclusion.

There was no justiciable controversy presented by the cross-claim. The court lacks jurisdiction to determine any such controversy if one exists. The court has failed to make findings upon which a conclusion of liability of appellant can be based. The surety cannot be charged with financial liability on a contract or claim foreign to the one for which the bond was given. The findings are con-

flicting, but if the conflict is resolved according to the only rationale which will eliminate conflict, exoneration of the surety will result. The evidence shows that had adequate findings been made in accordance with the evidence, appellant would of necessity be exonerated of liability to cross-claimants.

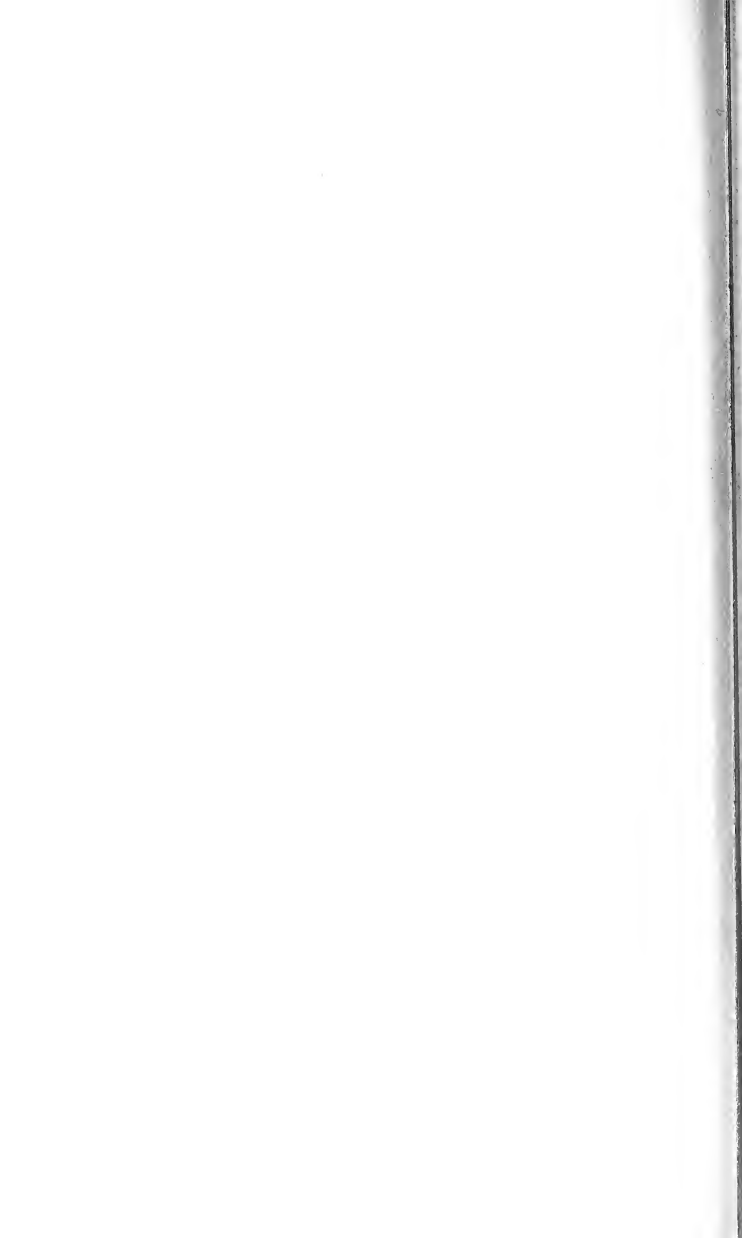
The Radkovich cross-claim should be dismissed for want of jurisdiction, but if this Court should conclude that the trial court had jurisdiction, appellant should be exonerated from liability to cross-claimants for all or any one of the reasons hereinabove specified.

Respectfully submitted,

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR,
ALBERT LEE STEPHENS, JR.,

By ALBERT LEE STEPHENS, JR.,

*Attorneys for Appellant Glens Falls
Indemnity Company.*



APPENDIX.



Chart of Pleadings.

Plaintiff

WESTINGHOUSE ELECTRIC SUPPLY COMPANY, a Delaware corporation
(United States of America at the relation of and to
the use of Westinghouse Electric Supply Company)
(Nominal Appellee)

Legend

- Westinghouse action
- == Radkovich cross claim
- === Woolley cross claim
- Complaint
- ← Answer

Westinghouse complaint against Radkovich and
Sureties based upon Miller Act (R.3)

Jurisdiction between
Westinghouse and Woolley
dependent upon diversity.

Answer to
complaint
(R.29)

Answer to
complaint
(R.26)

Appellee

WM. RADKOVICH COMPANY, INC.,
a California corporation

Appellee

RADKOVICH SURETIES

1. United Pacific Indemnity Company, a Washington corp.
2. General Casualty Company of America, a Washington corp.
3. Excess Insurance Company of America, a New York corp.
4. Manufacturers' Casualty Insurance Company, a Pennsylvania corporation.

Answer to
Complaint
(R.32)

Cross claim by Radkovich and Radkovich Sureties (R.18)

Jurisdiction dependent upon cross claim
being ancillary to Westinghouse action.

Answer to

Cross Claim
(R.36)
Amendment
of P. 2
(R.89)

Answer to
Cross Claim
(R.55)

Answer to
Cross Claim
(R.71)

Answer
to
Cross
Claim
(R.76)

Appellant

GLENS FALLS INDEMNITY
COMPANY, a New York
corporation

E. B. WOOLLEY
(Nominal Appellee)

E. B. Woolley cross claim under Miller
Act (R.59), Supplement and Amendment (R.82)

No. 13606

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, Wm.
RADKOVICH COMPANY, INC., *et al.*,

Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.



ANDERSON, McPHARLIN & CONNERS,
458 South Spring Street,
Los Angeles 13, California,

*Wm. Radkovich Company, Inc., a Corporation,
United Pacific Insurance Company, a Cor-
poration, General Casualty Company of
America, a Corporation, Excess Insurance
Company of America, a Corporation,
Manufacturers' Casualty Insurance Com-
pany, a Corporation, Appellees.*



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No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, Wm.
RADKOVICH COMPANY, INC., *et al.*,
Appellees.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

I.

Statement of the Pleadings.

The action was commenced by the filing of a complaint by Westinghouse Electric Supply Company [R. 3] (hereinafter referred to as Westinghouse), with the United States of America as nominal plaintiff as authorized by 40 U. S. C. A. 270b, commonly known as the Miller Act. The defendants named in said action were E. B. Woolley (hereinafter referred to as Woolley), the subcontractor, Wm. Radkovich Company, Inc., the prime contractor (hereinafter referred to as Radkovich), and certain sure-

ties for Radkovich, whose names appear on page 3 of the record and who will hereinafter be referred to as Radkovich Sureties.

In the original complaint, Westinghouse alleged the existence of the prime contract, and the furnishing of supplies to Woolley who it was alleged was a subcontractor acting under Radkovich. Then was alleged the materials supplied by Westinghouse to Woolley, their value, and the fact that they actually went into the project.

All the defendants named answered, and in addition thereto a cross-claim was filed by Radkovich and his sureties against Woolley in which it was alleged that if cross-claimants were liable to Westinghouse in the principal action, then Woolley was in turn liable over to cross-claimants for like amount less any amount found to be due to Woolley.

Also named as a cross-defendant in the Radkovich cross-claim was the Glens Falls Indemnity Company (hereinafter referred to as Glens Falls). In all probability this should have been denominated as a third party complaint as it applied to Glens Falls, for the relief sought was that if Radkovich should be held liable to Westinghouse, that Glens Falls in turn would be liable to Radkovich under either of two bonds executed by Glens Falls, one a payment bond, and the other a performance bond. In each of these bonds Woolley was principal, Glens Falls was surety, and Radkovich was the obligee. Both Woolley and Glens Falls answered this cross-complaint.

In addition Woolley filed a cross-claim which was later amended against Radkovich and Radkovich Sureties in which the United States of America appears as nominal cross-complainant as in the principal action by Westinghouse. Radkovich and Radkovich Sureties answered this cross-complaint, which answer was adequate to cover the issues raised even after the cross-complaint was amended.

The pleadings presented to the court the entire controversy between these various parties arising out of the work performed. Judgment was rendered in favor of Westinghouse against Radkovich and Radkovich Sureties [R. 204]. Judgment was granted in favor of Radkovich and Radkovich Sureties against Woolley and Glens Falls in an amount equal to the judgment in favor of Westinghouse [R. 204]. Woolley recovered upon his cross-claim against both Radkovich [R. 211] and Radkovich Sureties [R. 205] for an unpaid balance on the subcontract, for certain extra labor and materials not included in the subcontract, for certain extra work caused by collapse of two buildings, for certain damages for delay, and for one-half the costs. The judgment in favor of Woolley expressly provided that Appellant Glens Falls should be entitled to apply as an offset against the judgment in favor of Radkovich and Radkovich Sureties all amounts for which Woolley was given judgment on his cross-claim [R. 205]. This left a balance due and payable by Woolley and Glens Falls. Only Glens Falls has appealed from this judgment.

II.

Jurisdiction of the District Court and the United States Court of Appeals.

1. Jurisdiction of the District Court.

Jurisdiction of the District Court was invoked by Westinghouse pursuant to the express provisions of federal statute, 40 U. S. C. A. 270b. In order to present to the court the necessary allegations upon which the District Court could entertain the action in accordance with 40 U. S. C. A. 270b(a), Westinghouse alleged the existence of the principal contract, the subcontract between Woolley and Radkovich, the existence of the bonds of Radkovich Sureties, the supply of materials to Woolley for use in the project, and an allegation that the contract was to be performed at Muroc, California, which is within the district of the trial court [R. 6]. In such an action the subcontractor is a proper party defendant (*United States to the Use and Benefit of Par-Lock Applicators of N. J. v. J. A. J. Const. Co., et al.* (D. C. E. D. Pa., 1943), 49 Fed. Supp. 85, affd., 137 F. 2d 584) and thus no further allegations were required for jurisdiction over the claim against Woolley

The Radkovich cross-claim against Woolley arose out of the transaction or occurrence upon which Westinghouse was relying in the principal action and thus was authorized by Rule 13(g), Federal Rules of Civil Procedure. That portion of the Radkovich cross-claim which sought relief against Glens Falls was squarely within the provisions of Rule 14(a), Federal Rules of Civil Procedure as it was asserted that if Radkovich was liable to Westinghouse, that by virtue of its bonds, Glens Falls would be liable over to Radkovich.

The Woolley cross-claim, like the Westinghouse principal action, depended upon the Miller Act for its jurisdictional requirements, but could just as well have been predicated upon Rule 13(g), Federal Rules of Civil Procedure for the reason that it was an action by one co-defendant against another co-defendant based upon the transaction or occurrence which was the subject of the principal action.

2. Jurisdiction of the United States Court of Appeals.

Jurisdiction on appeal is based upon 28 U. S. C. A. 1291.

III.

Statement of Facts.

Appellant's statement of facts is for the most part correct. Certain effort has been made by appellant to point up that portion of the evidence which was favorable to appellant in regard to whether or not certain items were extras, and as to the amount and method of payment. As to these matters, suffice it to say there is a conflict in the evidence, which conflict the trial court resolved as it did by its findings of fact. As to the telephone circuits, signalling system, and the fixtures, the trial court gave judgment for Woolley for these items as extra items not included in the subcontract. The facts surrounding the manner and method of determining the progress payments due Woolley were sufficiently conflicting that the trial court felt that appellant had not met its burden of showing that there were premature payments and found accordingly in Finding of Fact XVIII [R. 200]. In regard to the matter of a change in the method of the pay-

ments, the trial court found that there was no evidence that there had been a departure from the terms of the subcontract in this regard [R. 201].

IV.

Introduction to Argument.

Although the possibility of some duplication exists, appellee has endeavored to follow the basic outline presented by appellant to facilitate the court's consideration of the two briefs.

In its original cross-complaint appellee pleaded only the payment bond. At the suggestion of counsel for appellant, the performance bond was added to the pleadings. It should be borne in mind that the findings of the court in regard to the performance by Woolley of his portion of the subcontract, go only so far as to find that Woolley performed the subcontract *work*. From the stipulation of the appellant that Westinghouse had not been paid in full [R. 232], it is obvious that a finding that Woolley had performed in full would not be supported by the evidence. Appellee believes that the two bonds are separate instruments given for two separate purposes and that there is no basis for interpreting the two bonds as one instrument, or for reading into the payment bond the provisions of the performance bond.

ARGUMENT.

I.

The District Court Had Jurisdiction of the Radkovich Cross-claim.

A. The Radkovich Cross-claim Is Ancillary to the Principal Action.

No argument is made by appellant that the District Court did not have jurisdiction over the claim of Westinghouse Electric Supply Company against Radkovich and his Sureties. Jurisdiction for such actions is specifically conferred by the provisions of the Miller Act (40 U. S. C. A., Sec. 270b, subsec. (b)). Where such an action is commenced, the Federal District Court for any district in which the contract was to be performed and executed has jurisdiction over the action without regard to the amount of the controversy involved or without regard to the citizenship and residence of the parties to the action. It should be borne clearly in mind that this action by Westinghouse was by a material supplier of the subcontractor Woolley. As such Westinghouse had no direct contractual relationships with Radkovich. Nevertheless, by the provisions of subsection (a) of Section 270b of U. S. C. A. Title 40, a right of action is given to Westinghouse. And by the provisions of subsection (b) of Section 270b of U. S. C. A. Title 40 such an action must be brought in the Federal District Court. Where such an action is commenced, it has been held that the prime contractor is a proper party to the action. (*United States to the Use and Benefit of Foster-Wheeler Corp v. Amer. Surety Co. of N. Y.* (D. C. N. Y., 1938), 25 Fed. Supp. 700.) It has also been held that in such an action the subcontractor is a proper party defendant

where the action is against the general contractor and his sureties. (*United States to the Use and Benefit of Par-Lock Applicators of N. J. v. J. A. J. Const. Co. et al.* (D. C. E. D. Pa., 1943), 49 Fed. Supp. 85, affd., 137 F. 2d 584.)

Appellant next urges that the Westinghouse action has two phases, one phase being an action against Radkovich and his sureties wherein jurisdiction is conferred by the provisions of 40 U. S. C. A. 270b without regard to the amount in controversy or the diversity of citizenship of the parties, and a second phase being an action against Woolley which it is contended depends upon diversity of citizenship and amount in controversy. This is an attempt by appellant to divest the District Court of jurisdiction of the matter by tenuous distinctions. It is true that the Westinghouse action against Woolley is founded upon the contract obligation of Woolley to pay for materials purchased from Westinghouse. It is not true that as to this phase of the action depends upon diversity of citizenship and amount in controversy in order for the court to have jurisdiction over the matter. The jurisdiction over the Westinghouse v. Woolley portion of the action attaches without regard to the citizenship of the parties or the amount in controversy because the matter was ancillary to the action of Westinghouse against Radkovich and his sureties. It is likewise true that the Radkovich cross-claim is ancillary to the original action by Westinghouse. Being ancillary, no issue of diversity of citizenship or amount involved in the controversy is raised, nor is the pleading of such jurisdictional facts relative to amount in controversy or citizenship required. Appellant quotes Barron and Holtzoff in Volume 1 of Federal Practice and Procedure (Rules Ed.) (hereinafter referred to

s Barron & Holtzoff) commencing at page 781 as follows:

“A counterclaim or cross-claim arising out of the transaction or occurrence that is the subject matter of the original action or counterclaim therein, or relating to property that is the subject matter of the original action, may be adjudged even though independent grounds of federal jurisdiction do not exist.”

This basic rule, as provided in Rule 13(g) of Federal Rules of Civil Procedure is sufficient to demonstrate that the cross-claim of Radkovich against Woolley is so related to the principal action as to require no independent grounds of jurisdiction.

Had appellant read further in the above-quoted text, he would have discovered the following language in Barron and Holtzoff (Vol. 1, Sec. 427, p. 865):

“The third-party complaint need not state any grounds of jurisdiction if the court already has jurisdiction of the principal action and the third-party claim needs no new grounds of jurisdiction to support it. Otherwise such grounds must be stated.”

Citing as authority therefor *Dworkin v. Spector Motor Service* (D. C. Conn., 1944), 3 F. R. D. 340. See also Rule 8(a) Federal Rules of Civil Procedure expressly excepting from the requirement of pleading basis of jurisdiction in counterclaims, cross-claims, and third-party claims, when the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.

Whether or not the claim needs new grounds of jurisdiction to support it depends on whether or not the matter in issue in the third-party claim or the cross-claim is sufficiently related to the principal action as to be con-

sidered to be ancillary thereto. It is the well established rule that the District Courts have jurisdiction to complete the adjudication of a matter in its entirety once the jurisdiction of the court has been competently invoked. (*Lesnik v. Public Industrials Corporation* (C. C. A. 2nd, 1944), 144 F. 2d 968; *Arizona Lead Mines v. Sullivan Mining Co.* (D. C. Idaho, 1943), 3 F. R. D. 135.) It has also been held that the expression "transaction or occurrence" may comprehend a series of many occurrences. (*Lesnik v. Public Industrials Corporation, supra.*) The principal action by Westinghouse arose not out of the execution of the bond by Radkovich's Sureties alone. It arose out of the entire series of transactions including the prime contract, the Miller Act bond, the subcontract, the subcontract bonds, and the sale of goods to Woolley. All these occurrences were necessary for Westinghouse to spell out its right, so it is submitted, the cross-claim of Radkovich comprehended the same transactions and occurrences of the principal action, and that no new bases of jurisdiction were required.

B. The Radkovich Cross-claim Is Authorized by Rule 13.

Appellant seeks to limit the "transaction of occurrence" which was the subject matter of the principal action to the bond of Radkovich given under the Miller Act. Clearly this effort of appellant's is without foundation in fact or in law. It is true that by the provisions of the Miller Act a material supplier who has sold materials which were furnished for use on a government contract in which a Miller Act bond is required may bring an action directly on the bond and against the general contractor in the Federal district court without regard to the amount in controversy or the citizenship of

the defendants. However, in order to qualify as one of the class to whom this right of action is given, the material supplier must allege facts which show some transaction or occurrence between the material supplier and the sub-contractor on the job covered by the Miller Act bond, which reveals that the supplier did actually supply materials for the job in question. In other words, the execution of the Miller Act bond does not *ipso facto* give to persons who have sold or who do thereafter sell materials to a subcontractor of the bonded general contractor a right to bring an action on the bond. To spell out such a right to recover on the Miller Act bond and against the general contractor, the material supplier must allege facts which reveal a transaction or occurrence between himself and the subcontractor such as will give the supplier the right to bring the action. Thus it may be seen that the transaction or occurrence which is the subject matter of the action by such a material supplier is not just the bond provided by the general contractor pursuant to the Miller Act, but the transaction or occurrence which is the subject matter of the action encompasses his contract of sale to the subcontractor and the subcontractor's subcontract with the general contractor, as well as the general contract itself. As has been observed above, the expression transaction or occurrence may comprehend a series of many occurrences such is the situation in the present case. In order to avail itself of the right to bring the action in the first place, Westinghouse had to rely upon a series of transactions commencing with the execution of the general contract, the Miller Act bond, the subcontract, and its own contract of sale to Woolley. *Absent any one of these transactions or occurrences, and Westinghouse would not have*

been able to state a cause of action on the Miller Act bond in this matter. The fact is that the transaction or occurrence which is the subject of the original action by Westinghouse comprehended all these occurrences. The cross-claim of Radkovich and his sureties names as cross-defendants Woolley and Glens Falls Indemnity Company. As to Woolley there can be no doubt but that the cross-claim is authorized by Rule 13(g) Federal Rules of Civil Procedure. Woolley was a proper party in the original Westinghouse action as was Radkovich and his sureties. United States to the Use of *Par Lock Applicators of N. J. v. J. A. J.* (*supra*) Rule 20(a) Federal Rules of Civil Procedure, provides in regard to the joinder of parties defendant:

“All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.”

In the Westinghouse action the question of fact was what materials and of what value was supplied to Woolley, whether or not it went into the job, and whether or not Westinghouse had been paid for materials so supplied. These same questions of fact were at issue in the claim of Radkovich against Woolley. Thus, clearly Radkovich and his sureties could assert a cross-claim against Woolley a co-defendant, by the provisions of Rule 13(g). Appellant urges that the Radkovich cross-claim is misnamed, as to cross-defendant Glens Falls, for the reason that it should be denominated as a

third party claim. Regardless of this and in accordance with the liberal rules of pleading adopted by the Federal Rules of Civil Procedure, the claim against Glen Falls must stand or fall on its substance and not on the particular title which Cross-complainant has given to his pleading. Rule 8(f) Federal Rules of Civil Procedure.

Appellant argues that whatever the claim against Glens Falls may be that it is an improper attempt to implead a third party. Turning now to the *Radkovich v. Glens Falls* phase of the cross-claim appellant argues that the issues are wholly outside the issues of the original action and that there is no basis for ancillary jurisdiction. Appellee contends, however, that the issues of the Radkovich claim versus Glens Falls are directly within the issues of the original Westinghouse claim and as such the claim is authorized by Rule 14a of the Federal Rules of Civil Procedure. Further, appellee contends that this matter is ancillary to the principal action and is within the jurisdiction of the court to determine in one action all matters relevant to the controversy before it and over which it has jurisdiction.

(1) AS TO THE ISSUES INVOLVED.

Analyzing the claim of Westinghouse we find that it is the claim of a material supplier against the subcontractor to whom it supplied the material and with whom it had direct contractual relationships, and against the general contractor and his sureties with whom it did not have any direct contractual relationship. The claim of Radkovich against Woolley arose out of the very subcontract between Woolley and Radkovich which gave

Westinghouse a right to bring the action in the first place. The subcontract between Radkovich and Woolley provided that Woolley would provide two bonds, a performance bond and a payment bond for the benefit of Radkovich. Pursuant to this requirement of the subcontract, Glens Falls executed both the performance bond and the separate payment bond [see Ex. C.]. The subcontract between Woolley and Radkovich recites that as a condition precedent to the granting of the subcontract that the subcontractor agreed to provide the bonds which were in fact executed by Glens Falls [R. 45]. Had the bonds not been executed the subcontract would not have come into existence. Since Westinghouse based its claim against Radkovich and his sureties on the fact that it has supplied a subcontractor of Radkovich with materials for which it has not been paid, it must necessarily follow that the issues involved included the questions as to whether or not Westinghouse had been paid by Woolley and what the value of the materials supplied was. By the terms of the payment bond Glens Falls agreed to pay Radkovich if Woolley should not hold Radkovich free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in the subcontract. The issues of the Westinghouse claim versus Radkovich and his sureties were primarily whether or not Woolley had paid it, a material supplier, for materials supplied in the prosecution of the work. The issues in the claim of *Radkovich v. Glens Falls* were whether or not Woolley had paid Westinghouse, a material supplier, for the materials supplied in the prosecution of the work.

(2) THE RADKOVICH CLAIM VERSUS GLENS FALLS IS ANCILLARY TO THE WESTINGHOUSE ACTION.

From the above discussion it may be seen that the cross-claim of *Radkovich v. Woolley* and the third party claim versus *Glens Falls* involved the very issues which were before the court in the action by *Westinghouse v. Radkovich* and its sureties. It may also be seen that the transactions and occurrences upon which Westinghouse depended for jurisdiction and upon which Radkovich depended were all interdependent. It has been held that for ancillary jurisdiction it is not necessary that all the rights arise out of the same contract. An ancillary suit may be maintained though the rights arise under different contracts and without regard to the citizenship of the third party defendant. (*Saba v. Emil Katz & Co.* (D. C. S. D. N. Y., 1944), 55 Fed. Supp. 1000); (*Morrell v. United Air Lines Transp. Comp.* (D. C. S. D. N. Y., 1939), 29 Fed. Supp. 757); (*Hoskie v. Prudential Ins. Co., etc.* (D. C. S. D. N. Y., 1941), 39 Fed. Supp. 305); (*Bossard v. McGwinn* (D. C. W. D. Pa., 1939), 27 Fed. Supp. 412). Appellant argues that the matter must be ancillary before a third party may be brought in. The true rule is that if the requirements of Rule 14a are met and a third party may be brought in then the matter is ancillary. (*Herrington v. Jones* (E. D. La., 1941), 2 F. R. D. 108). A third party may be brought into a case where it is alleged that the third party is liable to the defendant in the original action on an indemnity or insurance agreement. (*Sussan v. Strasser* (E. D. Pa., 1941), 36 Fed. Supp. 266.) Before 1948 Rule 14a allowed the bringing in of a third party defendant who it was alleged was liable only

to the plaintiff as well as those who it was alleged were liable to the defendant. This rule was unworkable, as the original plaintiff could not be required to amend his complaint to assert his rights against the third party so brought in who it was alleged was liable to the plaintiff only. By the amendment of 1948 to Rule 14a a third party defendant can only be brought in when it is alleged that he is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. Such third party claims are to be considered ancillary to the main suit. (*Reed v. Hickey* (E. D. Pa., 1941) 2 F. R. D. 92).

C. General Provisions Regarding Ancillary Jurisdiction.

Appellant contends that Rule 82 in effect limits Rule 14a in the same manner as the wording in Rule 13(h) namely, that the bringing in of a third party will not be allowed if to do so would deprive the court of its jurisdiction. Even appellant recognizes that where the Federal district court has jurisdiction over the principal action that as a necessary element of its power to decide cases it would have ancillary jurisdiction over related matters. In the discussion of third party practice in *Barron & Holtzoff*, Vol. 1, sec. 424, p. 841, it is stated thusly:

“Clearly a third-party claim by a defendant that a third person is liable to him for all or part of the claim in suit is so closely involved with the subject matter of the action as to be regarded as ancillary thereto. Thus if the court has jurisdiction of the principal action, it needs no independent grounds of jurisdiction to entertain and determine the defendant's third-party claim.”

That this expression of the leading text writers on the subject is borne out by the decisions is evident from the case of *Miller v. Hano* (D. C. E. D. Pa., 1947), 8 F. R. D. 67. See also *O'Brien v. Richtarsic* (D. C. W. D. N. Y., 1941), 2 F. R. D. 42, 44; *Reed v. Hickey*, 2 F. R. D. 92; *Herrington v. Jones*, 2 F. R. D. 108, and *Sussan v. Strasser* (E. D. Pa., 1941), 36 Fed. Supp. 266.

See also *Millsap v. Lots* (D. C. Mo., 1951), 11 F. R. D. 161 where the court indicated that the ancillary jurisdiction of the court extended to matters incidental to the principal suit whether by counterclaim or by cross-claim or third party claim.

Again these leading text writers Barron & Holtzoff, Vol. 1, sec. 424, p. 846, state:

“Federal ancillary jurisdiction is not defeated by the fact that the liability of a third party is joined with an alternative claim that the third party is the sole party liable to the plaintiff (*Arsht v. Hatton* D. C. Pa., 1947, 72 Fed. Supp. 851), nor by the fact that the liability of the third party defendant is asserted upon a basis differing from that upon which the plaintiff's original claim for relief is asserted (*Kelly v. Pa. Ry. Co.*, D. C. Pa., 1948, 7 F. R. D. 524), as in the case of an indemnity agreement (*Pearce v. Pa. Ry. Co.*, D. C. Pa., 1946, 7 F. R. D. 420, affirmed 162 F. 2d 524) or violation of duty imposed by contract and state law.” (*Kelly v. Pa. R. Co. supra.*)

A third party action is ancillary to the original action and requirements as to venue and jurisdiction over subject matter need not be complied with in the third party

action, but this rule does not extend to service of process and jurisdiction over person.

Miller v. Hano (D. C. E. D. Pa., 1947), 8 F. R. D. 67;

Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier (D. C. Neb., 1952), 13 F. R. D. 146.

Appellant suggests that only a true cross-claim (such as the Radkovich claim versus Woolley) or a compulsory counterclaim should be considered to be ancillary to the principal action, citing Barron & Holtzoff for the rule. Appellant also cites that source for a statement that a permissive counterclaim is not to be considered to be ancillary to the principal action but must be supported by independent grounds of jurisdiction. Had appellant cited further in the same source he would have discovered the language above cited from section 424 relative to third party claims. Thus it may be stated that the *true rule is that compulsory counterclaims, cross-claims, and third party claims* are all to be considered to be ancillary to the principal action and not dependent upon independent grounds for jurisdiction. See *Millsap v. Lotz, supra*. Permissive counterclaims may require independent bases of jurisdiction, but such permissive counterclaims are not in issue in this action. With these distinctions clearly in mind let us now turn to appellant's discussion of the specific limitations of ancillary jurisdiction in cases brought under the Miller Act.

D. Ancillary Jurisdiction in Cases Under Miller Act.

The question of whether a matter may be considered ancillary to the principal action is not dependent upon whether the principal action is placed in a federal court because of diversity of citizenship and amount in controversy, or whether the matter is in the federal district court pursuant to express statutory provisions requiring the action to be brought in a federal court. It has been held that a third party claim may be allowed without regard to amount in controversy and citizenship of the third party defendant, even though the principal action was placed in the federal court by statute of the United States. In *National City Bank of New York v. Valldejuli Puig* (U. S. D. C Puerto Rico, 1952), 106 Fed. Supp. 1, the action was in the federal court by virtue of the statutory provisions of the Banking Act of 1933. A third party claim was allowed against a co-obligor on a letter of guaranty. It was argued that the third party defendant and the defendant in the principal action being citizens of the same district divested the court of jurisdiction. This argument was rejected by the court which indicated that where jurisdiction of the court attached pursuant to United States statute that the lack of diversity between the defendant and the third party defendant was not material, relying upon *Williams v. Keyes* (C. A. 5, 1942), 125 F. 2d 208.

Appellant's contention that because jurisdiction in a Miller Act case is conferred by statute, that the provi-

sions relative to third party claims do not apply is not supported by the decisions. In *United States v. Skilken* (D. C. N. D. Ohio, 1943), 53 Fed. Supp. 14, cited by appellant very briefly on page 47 of appellant's brief, the court considered very carefully the theory of the asserted claims and allowed both a counterclaim and a third party claim as ancillary to the main action. The facts are strikingly similar. In that case the principal action was by the United States to the Use and Benefit of *Jones v. Skilken* and his sureties. Jones was a subcontractor. Skilken was a general contractor who had executed a contract with the Federal government and had put up the required Miller Act bond. In addition Skilken had required Jones to put up a bond guaranteeing that Jones would perform the subcontract and would pay all labor and material bills incurred by Jones on the job. This is analogous to our case where Woolley, a subcontractor to Radkovich the general contractor, who had provided Miller Act bonds, was required by the general contractor to put up a payment bond and a performance bond for the protection of the general contractor.

In the *Skilken* case, the general contractor brought a counterclaim against the subcontractor, Jones, and a third party claim against the subcontractor's surety. Note the similarities to the case at bar. Radkovich brought a cross-claim against Woolley and a third party claim against Glens Falls. Appellant admits that cross-claims are to be considered to be ancillary, and by the *Skilken* case the court takes the position that claims against the third party surety are also ancillary. It should be noted that in the *Skilken* case, there was no contention that

the subcontractor's surety would be liable to the general contractor for like amounts as the court might find the general contractor liable to the subcontractor. For this reason, the court indicated that the surety was brought in under the provisions of Rule 13(h) in order to complete the determination of the controversy before it. On page 20 of that opinion the court stated:

“Following the procedure in the above case, it would seem proper for the defendant Skilken Brothers to bring in the United States Fidelity & Guaranty Company, surety for the subcontractor, as a third party defendant, in an effort to recover from it any loss which it may prove to have sustained by reason of the failure of the plaintiff to perform the obligations under the contract to insure the performance of which the bond of the United States Fidelity and Guaranty Company was given.”

See also *Schram v. Roney* (1939), 30 Fed. Supp. 458 where after an excellent discussion the court allowed a third party claim.

The case of *United States v. John A. Johnson* (D. C. D. Md., 1945), 65 Fed. Supp. 514 cited by appellant as the greatest extension of the courts in cases under the Miller act involved an action by a material man against the general contractor and his sureties. The subcontractor was brought in by the general contractor, and sought to litigate in the matter the question of *damages for breach of contract* against the general contractor. This case is not analogous to the one at bar factually, but in any event only stands for the proposition that the court will not entertain *damage* suits in a Miller Act proceeding.

Appellant's argument that to permit the joinder of a claim which has no independent basis of jurisdiction would be to allow Rules 13 and 14 to extend the jurisdiction of the District Courts in violation of Rule 82. This is begging the question, for the true rule is that the jurisdiction of the Federal District Court encompasses ancillary matters and independent bases of jurisdiction are not required. Appellant would treat the rule as being, that if independent basis of jurisdiction are not present, then the matter is not ancillary. This is getting the cart before the horse. *The first consideration of the court is whether or not the matter is truly ancillary. If it is then no further consideration of the bases of jurisdiction need be made.* In other words, a determination that a matter is ancillary establishes the court's jurisdiction over that matter, not the other way around. And the question of whether or not a matter is ancillary turns on whether it arises out of the same transaction or occurrence or series of transactions or occurrences as are the subject of the principal action over which the jurisdiction of the court has been properly invoked. (*Chernow v. Cohn & Rosenberger, Inc.* (1934), 5 Fed. Supp. 869).

Relying upon dicta from various cases, the appellant seeks to confuse the issue before the court in the present case. In *United States v. Biggs* (D. C. E. D. Ill., 1942), 46 Fed. Supp. 8, the action was by the United States to the use of a subcontractor against the general contractor and his surety. The case stands for the proposition that the defendant general contractor could not seek affirmative relief against the United States under the procedure of Rule 13(g) especially in view

of the prohibition contained in Rule 13(d). *Seaboard Surety v. United States* (C. C. A. 9, 1936), 84 F. 2d 348, indicates that a claimant under a Miller Act bond may proceed without joining the principal contractor. This case should be considered along with *United States to the use of Foster-Wheeler Corp. v. Amer. Surety Co. of N. Y.* (D. C. N. Y., 1938), 25 Fed. Supp. 700 that the principal contractor is a proper party in a Miller Act proceeding.

United States v. Landis & Young (D. C. W. D. La., 1936), 16 Fed. Supp. 835 and *United States v. Maples* (D. C. W. D. La., 1934), 6 Fed. Supp. 354 are both District Court cases and are earlier than the decision in *United States v. Skilken* (D. C. N. D. Ohio, 1943), 53 Fed. Supp. 14, wherein the general contractor was allowed to bring in the subcontractor's surety for a complete determination of the matter. In line with the liberal spirit of the Federal Rules of Civil Procedure, and to give some meaning to Rule 14(a) it is submitted, that where as in the present case, a defendant in the principal action seeks relief on a contract with a third party for any liability which he, the original defendant may suffer in the principal action, the third party claim should be allowed and litigated as ancillary to the principal action.

It is true that the claim against the third party defendant must be that of the original defendant, but based upon the original plaintiff's claim against the original defendant. It is not true as appellant suggests that the claim of Radkovich against Glens Falls is entirely separate and apart from the subject matter of the original action. The Radkovich claim against Glens Falls is not

independent in subject matter to the original action by Westinghouse. The subject matter of the Westinghouse action encompassed the entire transaction, including the general contract, the Miller Act bond, the subcontract, and the subcontract bond, which was required as a condition precedent to the execution of the subcontract [R. 45]. The test of whether or not the subject matter of the action arose out of the same transaction or occurrence is whether or not the same evidence would support or refute both claims. (*Brown v. 1st National Bank v. Grimmett* (D. C. E. D. Okla., 1953), 18 F. R. S. 14(a) .52, Case 1.) Applying that test in this case it is obvious that the questions of fact relative to what Westinghouse supplied, and whether or not Woolley paid Westinghouse for the materials so supplied are the same questions of fact litigated in the Radkovich claim against Glens Falls and depended upon the same evidence in support thereof.

E. The Radkovich Cross-claim Is Directly Authorized by the Rules.

Treating only the Radkovich claim against Glens Falls as in issue in this appeal, it is clear that such action is directly contemplated by Rule 14(a) of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure provide in part in Rule 14(a):

“Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff for leave as a third party plaintiff to serve summons and complaint upon a person not a party to the action *who is or may be liable* to him for all or part of the plaintiff’s claim against him . . .” (Emphasis added.)

The import of this rule is that if a determination that the defendant is liable to the plaintiff gives rise to a right on the part of the defendant to bring an action against a third party, then that third party may be brought in and that aspect of the matter disposed of at the same time that the liability of the defendant is fixed. Further, it is to be noted that by Rule 14(a), the third party defendant may be brought in if he either "is or may be liable" to the original defendant. Thus the rule expressly indicates that third parties may be brought in when their liability is not yet fixed or determined but is in reality inchoate. This rule has been said to have the effect of "accelerating" the cause of action and providing that the third party whose liability is still not yet matured may nevertheless be brought into the action.

In *Glens Falls Indemnity Co. v. Atlantic Building Corp.* (C. A. 4, 1952), 199 F. 2d 60, the principal action was by an insured against the insurance company. The company sought to bring in as a third party defendant one whom it was averred would be liable to the insurance company upon the principles of subrogation. It should be noted that by the substantive law of South Carolina, which was applicable in the case, no cause of action based upon subrogation could be asserted until the subrogee had actually paid out money. Nevertheless, the court held that by the provisions of Rule 14(a) the subrogor could be brought in as a third party defendant. A good statement of the attitude of the Fourth Circuit Court on the applicability of Rule 14(a) is to be found on page 63 of that decision where it is stated:

"It is true in South Carolina and elsewhere that the right of subrogation may not be recognized unless the party asserting it has paid the debt on which the

right of subrogation is based. *American Surety Co. v. Hamrick Mills*, 191 S. C. 362, 4 S. C. 2d 308, 124 A. L. R. 1147. But this rule applies when the indemnitor brings a separate suit against the person whose action has caused the loss. Rule 14 was designed to prevent this circuity of action and to enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit. It is generally held that it is no obstacle to a third party action that the liability, if any, of the third party defendant can be established only after that of the original defendant and after satisfaction of the plaintiff's claim, where subrogation is the basis of the claim. See *Lee's Inc. v. Transcontinental Underwriters, Md.*, 9 F. R. D. 470, and cases cited."

In *McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co.* (U. S. D. C., E. D. Pa.), 17 F. R. S. 14a.221, Case 1, the same result was reached where the third party defendant insurance company sought to assert a provision in an insurance policy that no action would lie thereon until a loss had been sustained, the court holding that by Rule 14(a) the insurance company could properly be brought in. See also *Jordan v. Stephens* (1945), 7 F. R. D. 140, in accord.

Bill Curphy Co. v. Lincoln Bonding & Insurance Co. v. Bornemeier (D. C. Nebr., 1952), 13 F. R. D. 146, is a case very much in point. The question came up on motion of a third party defendant to dismiss because it was contended that he was of the same citizenship as the original defendant. The court's remarks are pertinent to the case at bar. On page 147 it stated:

"In its present form, Rule 14(a) allows the bringing in by a defendant of one not originally a party

to an action as a third party defendant 'who is or may be liable to' the defendant 'for all or part of the plaintiff's claim against' the defendant. No other jurisdictional prerequisite to the employment of the procedure is expressly imposed by the rule.

"Here the defendant, sued by the plaintiff on a subcontractor's performance bond and a subcontractor's payment bond in each of which the plaintiff is the obligee, Dungan the contractor-obligor, and the defendant the surety-obligor, seeks to hold as liable to it for any recovery against it by the plaintiff, (a) Dungan both as primary obligor in the bonds and as the maker of special engagements for the defendant's indemnification contained in the application for the bonds, and (b) Bornemeier by virtue of an express written joinder in the engagements of Dungan endorsed on that application. It is difficult for the court to conceive a more fitting background than the plaintiff's action and demand against the original defendant, for resort to Rule 14(a), since the asserted obligations of Bornemeier and Dungan arose out of their procurement of the bonds on which the plaintiff predicates its claim against the defendant."

As to the question of the propriety of the third party complaint the court continued:

"Bornemeier challenges the jurisdiction of this court over him under the third party complaint on jurisdictional grounds, and particularly for want of diversity of citizenship as between the original defendant and the moving third party defendant.

"It is true that the original defendant and both of the third party defendants are citizens of Nebraska. But the jurisdiction of this court having been validly invoked and clearly existing as between

the plaintiff and the original defendant, it is now the settled position of the great majority of Federal courts that, in support of the otherwise permissible bringing in of third party defendants to answer a claim, which is clearly ancillary to the primary claim in suit, no new and independent ground of jurisdiction need exist as between the original defendant and the third party defendants, and specifically that community of state citizenship between them will not require a denial or dismissal of third party procedure. *Tullgren v. Jasper* (D. C., Md.), 27 F. Supp. 413; *Yap v. Ferguson* (D. C. N. Y.), 8 F. R. D. 166; *United States v. Pryor* (D. C. Ill.), 2 F. R. D. 382; *Falcone v. City of New York* (D. C. N. Y.), 2 F. R. D. 87; *Schram v. Roney* (D. C. Mich.), 30 F. Supp. 458; *Morrell v. United Air Lines Transport Corp.* (D. C. N. Y.), 29 F. Supp. 757; *United States v. Hecht* (D. C. Ohio), 9 F. R. D. 340; *Goodard v. Shasta S. S. Co.* (D. C. N. Y.), 9 F. R. D. 12; *Millsap v. Lotz* (D. C. Mo.), 11 F. R. D. 161. See also discussion in *Sheppard v. Atlantic Gas Co.* (3 Cir.), 167 F. (2d) 841. That some divergence of opinion upon the subject exists must be acknowledged; but the preponderance of authority favors the rule just stated. See textual analysis and discussion, *Moore's Federal Practice*, Second Edition, Vol. 3, p. 496, par. 14.26."

That this acceleration has been applied even where by state law the liability of the third party is not yet mature see *Glens Falls Indemnity Co. v. Atlantic Building Corp.* (*supra*) and *Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier* (*supra*). This concept applies even since *Erie R. R. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the theory being that such provision is procedural and not a part of the substantive law. (See

also *State of Ill. v. Md. Cas. Co.* (D. C. N. D. Ill, 1941), 2 F. R. D. 241.)

It is submitted, that as against Glens Falls, appellee Radkovich has stated a claim within the rules; that the very purpose and spirit of Rule 14(a) is to allow a defendant such as Radkovich to bring in a third party defendant such as Glens Falls. To interpret the Rule 14 in any other manner would be to unduly restrict the meaning of the language and to hamper the speedy and complete determination of the issues before the District Court. (See *Miller v. Hano* (D. C. E. D. Pa., 1947), 8 F. R. D. 67; *Lawrence v. Great Northern Ry. Co.* (D. C. Minn., 1951), 98 Fed. Supp. 746.)

In short, the very purpose of Rule 14 is to allow such claim as Radkovich here asserts against Glens Falls. Federal Practice & Procedure by Barron & Holtzoff, Vol. 1, Sec. 426, p. 850 states in regard to Rule 14:

“Subdivision (a) of this rule, both as originally drafted and as later amended, permits a defendant to bring into an action a third-party defendant ‘who is or may be liable to him’ for all or part of the plaintiff’s claim. Thus impleader is authorized to bring in a third party who would necesasrily be liable to the defendant for all or any part of plaintiff’s recovery, whether by way of indemnity, subrogation, contribution, express or implied warranty, or otherwise.”

See:

Yap v. Ferguson (D. C. N. Y., 1948), 8 F. R. D. 166;

Rappa v. Pittson Stevedoring Corporation (D. C. E. D. N. Y., 1943), 48 Fed. Supp. 911;

People of State of Ill. v. Md. Cas. Co. (D. C. N. D. Ill., 1941), 2 F. R. D. 241;

Falcone v. City of N. Y. (D. C. N. Y., 1941), 2 F. R. D. 87;

Watkins v. Baltimore & O. R. Co. (D. C. Pa., 1939), 29 Fed. Supp. 700;

Young v. Atl. Refining Co. (D. C. N. D. Ohio, 1949), 9 F. R. D. 491.

See also *Jordan v. Stephens* (D. C. W. D. Mo., 1945), 7 F. R. D. 140, where a general contractor was sued by the subcontractor's compensation insurance carrier and by an employee of the subcontractor, the general contractor was entitled to bring in as a third party defendant its own insurer, notwithstanding a policy provision that no action should lie against the insurer unless brought after amount of claim or loss had been fixed and rendered certain by final judgment or agreement.

II.

Radkovich Cross-claim States Grounds Upon Which Relief Can be Granted.

A. Allegations of Liability of Glens Falls.

The liability of Woolley and of Glens Falls is clearly spelled out in the pleading of Radkovich and his Sureties. Paragraph XI of the Radkovich pleading denominated cross-claim clearly sets forth that Westinghouse has made claim against Radkovich and his sureties, setting forth the amount of the claim and the facts out of which Westinghouse claims to be entitled to relief [R. 25]. The legal effect of the payment bond is alleged in Paragraph X, wherein it is alleged that Glens Falls bound itself to Radkovich as surety for Woolley as principal for the payment of labor and materials used in the prosecution of the work provided for in the subcontract [R. 23]. Further, any de-

fects in the pleading of the legal effect of the bond provided by Glens Falls are cured by the pleading by Glens Falls in answer to this third party claim of Radkovich and his Sureties, in that the bonds in question were pleaded as exhibits and their execution admitted. Such pleading presented to the court not only the legal effect of the bonds as pleaded by Radkovich, but also the entire bond as an exhibit which the court then had opportunity to interpret. Appellant suggests that by Rule 8(a) that a causal connection is required to be pleaded. Rule 8 (a)(2) provides "*a short and plain statement of the claim showing that the pleader is entitled to relief, and . . .*" From the Radkovich pleading it is clear that Radkovich was relying upon the provisions and promises contained in the bonds executed by Glens Falls for the relief sought. The relief sought is clearly spelled out in paragraph XI of the Radkovich cross-claim [R. 25] wherein it is alleged that Woolley has failed to pay Westinghouse, which caused Westinghouse to bring the action in the first place. Finally the prayer of the Radkovich pleading reveals the nature of the relief sought in that it is clear that Radkovich only wants to be paid whatever the court may find was due and owing and unpaid from Woolley to Westinghouse and in such amount as the court should find Radkovich liable. This is specifically within the realm of the purpose of a third party claim. Such claims are to be used where the defendant in the principal action claims that if he is liable to the plaintiff in the original action that the third party defendant is in turn or may be liable to the original defendant for like amount. Barron & Holtzoff, Volume 1, Section 255, page 431, states in regard to Rule 8(a)(2):

"This provision indicates clearly the intention of the rules to avoid technicalities and to require only

that the pleading give the opposing party fair notice of the nature and basis of the claim and a general indication of the type of litigation involved.”

Further, Rule 8(f) states “*All pleadings shall be so construed as to do substantial justice.*” It is submitted that the cross-defendant and appellant were in no manner misled by the pleading of Radkovich be it called cross-claim or third party claim. Further by its own answer wherein the Woolley subcontract and the Glens Falls bonds were set forth as exhibits, any defects in the pleading of Radkovich is cured.

Under these rules the complaint need not set forth every fact essential to plaintiff's right of recovery. (*Hess v. Factors Corp. of America* (D. C. E. D. Pa., 1948), 80 Fed. Supp. 727; *Lane Bryant, Inc. v. Maternity Lane, Limited, of Cal.* (C. A. 9th, 1949), 173 F. 2d 559.) A generalized summary of case that affords fair notice is all that is required of pleadings, which shall be so construed so as to do substantial justice. (*Bank of Nova Scotia v. San Miguel* (D. C. Puerto Rico, 1949), 9 F. R. D. 171.)

Barron & Holtzoff, Volume 1, Section 255, page 434 states:

“Conspicuously absent from this rule is the requirement of common law and code pleading that the pleader set forth ‘facts’ constituting a ‘cause of action,’ which resulted in abortive attempts to define ‘cause of action’ rigidly and to make clear distinctions between the ‘ultimate fact’ which must be pleaded and ‘evidence’ and ‘conclusions of law’ which must not be pleaded.”

In the present case, the pleading clearly shows the basis of the claim against Glens Falls, namely, the bonds exe-

cutted by it naming Radkovich the obligee. The claim further advised the third party defendant that the relief sought by Radkovich and his sureties to be that which the court shall find is due and owing to Westinghouse by virtue of Woolley's failure to pay Westinghouse. Such a claim does not deceive anyone. It is abundantly evident from the record and from all the pleadings on file in this matter that appellant Glens Falls was not in any manner deceived or confused as to the nature of the claim against it. No more than this is required of a pleading under the rules.

Rule 8(a) requires a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 14(a) allows the bringing in of a third party defendant when the original defendant avers that such third party "*is or may be liable to him for all or part of the plaintiff's claim against him*" . . . Taking these two rules together, there can be no doubt but that the allegations of Radkovich and his sureties relative to the claim which Westinghouse asserted against Radkovich, together with the allegations of the bonds which Glens Falls executed expressly for the purpose of holding Radkovich harmless in the event Woolley should fail to pay for the labor and material which went into the job covered by the sub-contract, state a claim upon which relief can be granted. The claim apprises the third party defendant of relief sought by Radkovich and of the facts out of which this relief is sought. Beyond this the pleader is not required to go under the rules. Further, under Rule 14(a) it is not necessary that the third party plaintiff allege that he has already suffered damage, but only that the third party defendant *may* be liable to the defendant, for the claim which the plaintiff asserts against the defendant.

To require more of a pleader on a third party complaint than the allegation of the facts which give the third party defendant notice of the fact that he may be held liable in the event the plaintiff prevails against the defendant would be to unduly restrict the provisions of Rule 14(a) and in fact make that portion which refers to the fact that a third party defendant may be brought in if it is alleged he *may* be liable to the original defendant a nullity.

The *Quilty* case relied upon by appellants (Appellants' Br. p. 58) was a situation where upon motion of the third party defendant, the court held that *unless amended* the third party complaint did not state a claim against the third party defendant. It is submitted, that in the absence of a motion by appellant attacking the third party complaint, and in view of the issues as they were litigated, that by the provisions of Rule 15(b) any defects in appellee's third party complaint were effectively cured. Rule 15(b) provides in part:

“When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.”

In the present case, the question of whether or not a claim was stated was in issue by virtue of appellant's Sixth Affirmative Defense and was effectively disposed of by Finding of Fact XVIII [R. 201]. Further, there was no doubt but that this question was litigated between the parties so by the provisions of Rule 15(b) the plead-

ing could even at this late date be amended, or in the absence of such an amendment the result of the trial still stands.

B. Radkovich Could be Allowed to Recover Under the Performance Bond.

1. PERFORMANCE OF THE SUBCONTRACT.

In the case at issue, it is clear that even if the pleadings were insufficient, as they originally were pleaded, that the issues which were tried, with the consent of the parties, involved the performance of both Radkovich and Woolley of the subcontract, and of the conditions precedent of both the performance bonds. On the question of the performance of the subcontract by Woolley, there is ample evidence that Woolley did not pay for all the materials which he ordered from Westinghouse [R. 232]. By the provisions of the subcontract Woolley agreed to furnish all the materials and labor necessary for the performance of the subcontract. His failure to pay Westinghouse was a direct failure to perform all of his promises of the subcontract. The issue of the payment by Woolley to Westinghouse was directly tried, and the finding of fact [Finding XI, R. 196] expressly show that Woolley failed in the performance of the subcontract in that he did not pay Westinghouse in full. It should be noted in this regard, that the objections to the proposed findings of fact [R. 166] included a statement that Woolley performed all of the subcontract. In the final form at the insistence of counsel for Radkovich and his sureties this finding now reads that Woolley performed the subcontract *work* [R. 185] for the very reason that the performance of the subcontract by Woolley involved not only the doing of the work but also the payment for

materials, and the evidence clearly showed that Woolley did not pay Westinghouse in full for the materials furnished and used in the subcontract. [See objections to proposed findings of fact, R. 167; Letter of E. V. McPharlin, R. 185; and final findings XIII, R. 197.] Further, the cross-claim against Woolley and Glens Falls clearly states that Woolley has not paid Westinghouse in full for the materials [R. 25], so there is a sufficient statement of the breach by Woolley. Woolley and Glens Falls were not deceived. The entire subcontract was pleaded as a part of the answer of Glens Falls, and taken together with the allegation of the Radkovich cross-claim that Woolley had not paid Westinghouse, the failure of Woolley to perform is sufficiently spelled out. Further, the performance bond was to be void only if Woolley performed his subcontract in its entirety. The performance of Glens Falls under the performance bond is dependent only upon and conditioned only upon the performance by Woolley. If Woolley performs it is void—if Woolley does not perform, the bond is still valid. By the finding of the court that Woolley did not pay Westinghouse in full, there is a finding that Woolley has failed to perform his portion of the subcontract. Such a finding gives rise to an action against appellant Glens Falls.

Blackwood v. McCallum (1922), 187 Cal. 655.

2. PERFORMANCE OF CONDITIONS PRECEDENT IN PERFORMANCE BOND.

Appellant refers to certain conditions precedent in the performance bond and argues (App. Br. p. 61) that the failure to perform such conditions precedent was alleged as an affirmative defense. Appellee's careful reading of the appellant's answer fails to reveal any place

herein the failure of Radkovich to perform conditions precedent was alleged by appellant as an affirmative defense. Nowhere in appellant's six affirmative defenses is the issue of non-performance of conditions precedent by Radkovich even raised in the pleadings. Nor is this matter raised by appellants in their objections to the proposed findings of fact [R. 166]. Appellant suggests that the matter of performance of conditions precedent of the performance bond cannot be considered as having been litigated for the reason that there is no finding of fact with respect to the performance by Radkovich of such conditions precedent. There is no allegation by appellant that there was no performance of conditions precedent, and if the issues of the performance of conditions precedent was litigated and a finding thereon be needed, that portion of finding XVIII [R. 201] which reads: "That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses" is sufficient. This finding negatives any defenses relied upon by Glens Falls. Although appellee fails to observe here the defense of a failure to perform conditions precedent was relied upon by appellant, if such was the case, then this portion of finding XVIII effectively disposes of such a defense.

C. Radkovich Has a Right of Recovery Upon the Payment Bond.

Appellant's contention that no right of recovery upon the payment bond exists for the reason that appellee has not alleged any loss or damage is without merit. To give any effect to Rule 14(a) regard that portion which says that a third party defendant may be brought in if it is alleged that he *is or may be liable* to the

original defendant it must necessarily follow that it is not necessary to show that the original defendant has already sustained a loss. And this is the rule even though by the existing state law no cause of action would arise until actual payment had been made by the original defendant. *Glens Falls Indemnity Co. v. Atlantic Building Corp.* (C. A. 4th, 1952), 199 F. 2d 60; *McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co.*, 17 F. R. S. 14a.221, Case 1; *Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Borne-meier*, 13 F. R. D. 146 and cases cited therein.

The payment bond clearly recites that it is a bond and denominates Woolley as principal and Radkovich as obligee with Glens Falls as surety. The promise of the bond is payment of money. Any ambiguities as to whether this is a surety bond or a contract of indemnity against loss or a contract of indemnity against liability will be construed against the surety. *Alberts v. American Casualty Co.* (1948), 88 Cal. App. 2d 891. A payment bond to guarantee the payment for labor and materials which go into a job are generally construed as contracts of indemnity against liability and not as contracts of indemnity against loss only. In *Ceremony v. Drummond* (1918), 37 Cal. App. 446, 448, the court had the problem of determining whether an action would lie upon such a bond before the owner had actually paid the claims of laborers and material men. The court stated in holding the surety liable even before payment by the owner:

p. 448 "The second point urged—that plaintiff could not maintain an action on the bond until he

had actually satisfied the claims of claimants—viewing the contract of the surety, we think should not be sustained. Contracts of this nature are now generally held to be contracts of indemnity against liability, rather than indemnity against loss sustained and paid.”

In view of the interpretation of such contracts as indicated by *Ceremony v. Drummond* (*supra*) and in accordance with the rule that under Rule 14(a) a third party defendant may be brought in even though it alleged only that he “*may*” be liable to the original defendant, and in accordance with the cases on the acceleration of liability under Rule 14(a) it is submitted that Radkovich had a right to recover upon the payment bond executed by appellant.

4. Any Issues Not Raised by the Pleadings Were Litigated So as to Cure the Defects in the Pleadings as Provided in Rule 15(b).

Appellant argues that any issues not raised by the pleadings were not litigated so as to cure the defect under Rule 15(b). Significantly, appellant does not indicate which issues he is referring to in this argument. This point appears in his brief under the general heading that appellee has failed to state a claim against appellants. This allegation of failure to state a claim was urged by appellant in his sixth affirmative defense so it cannot be said that this issue was not raised by the pleadings. As to this affirmative defense, the burden of proof was clearly upon appellant. The finding of fact disposing of this affirmative defense is found in paragraph XVIII [R. 201] of the findings of fact. That this finding of

fact is intended to dispose of this affirmative defense is borne out by reference to the Memorandum of Conclusions [R. 117, 127] which Memorandum of Conclusions was available to appellant when the findings of fact and conclusions of law were being prepared. Significantly, no objection to this finding of fact was made by appellant in its Objections to Proposed Findings of Fact and Proposed Conclusions and Judgment [R. 166].

The issue which was raised and which was litigated was that of whether or not Woolley has paid Westinghouse for the materials supplied by Westinghouse, and if not, what if any liability did appellant Glens Falls have to Radkovich because of such failure to pay. Appellee does not admit that the conditions precedent in the performance bond have any application to the payment bond. Were the payment bond alone pleaded it would provide sufficient basis for appellee's recovery against appellant. On the other hand, the failure of Woolley to pay for materials was a failure of performance of the subcontract, for which Radkovich should be allowed to recover on the performance bond as well. In any event, it is clear that two separate bonds were executed, and for two separate and different purposes, and conditioned upon two different things. [R. 49, 50]. Appellant seeks to eliminate the performance bond as a basis of the judgment for the reason that there is no allegation of performance of conditions precedent, although this non-performance of conditions was not urged by appellant as an affirmative defense. Appellant does not spell out in his brief that the issues of non-performance of the conditions precedent of the performance bond are the ones which he argues have not been litigated. If they

have not been litigated it is because appellant did not plead this as an affirmative defense, and not being pleaded such affirmative defenses are waived. Federal Rules of Civil Procedure 12(h). Nor did appellant sustain his burden of proof relative to the failure to state a claim upon the payment bond. Appellant argues that this can afford no basis for the judgment for the reason that no loss or damage was suffered by Radkovich. That this is not the law see the cases cited *supra* (Point I-E) relative to the acceleration of such claims and Rule 14(a) of the Federal Rules of Civil Procedure.

III.

Recovery by Radkovich Can be Predicated Upon the Payment Bond.

Appellant's argument against the payment bond as a basis of the judgment in this matter is that Radkovich did not allege and prove that the loss to Westinghouse was in fact paid. In support of this argument he cites the proposition that the contract between Glens Falls and Radkovich as obligee, which was the payment bond, was in fact a contract of indemnity, and of indemnity against loss only and not against liability. Assuming, but not conceding that it were a contract against loss only, then by the provisions of Rule 14(a) which allows the acceleration of the accrual of a cause of action such as would be the case if this were a contract of indemnity against loss, appellee is still entitled to judgment against Appellant. *Glens Falls Indemnity Co. v. Atlantic Building Corp.* (*supra*); *McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co.* (*supra*); *Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Borne-*

meier (supra); all cases applying this acceleration where by state law or by the terms of the contract the action had not accrued at the time the third party was brought in. Even by appellant's own interpretation of the payment bond as a contract of indemnity, then it is evident that the judgment could be predicated upon the payment bond.

Opposed to this however, is the position of appellee that the payment bond of appellant was a surety bond and not a contract of indemnity against loss only. This surety bond bound Glens Falls to pay money if Woolley did not. In *Alberts v. American Casualty Co.* 88 Cal. App. 2d 891 (1948) the court was interpreting a contract of indemnity for the purposes of determining whether or not it was a contract of indemnity against loss only or also against liability. On page 899 the court stated in part:

“If the contract binds the indemnitor to pay money and the payment of the money will prevent harm or injury to the indemnitee it is a contract of indemnity against liability. (42 C. J. S., §2, p. 565). Any obscurity in the language of the contract is to be construed against the party causing the obscurity to exist—in this case the indemnitor. (Civ Code, §1654; 31 C. J. §18, p. 427, and cases cited). The contract is to be liberally construed in favor of the indemnitee (*Union Electric Co. v. Lovell Livestock Co.*, 101 Mont. 450 (54 Pac. 2d 112, 115)), all fair doubts are to be resolved in favor of the indemnitee (*Eureka Coal Co. v. Louisville & N. R. R. Co.*, 219 Ala. 286 (122 So. 169, 171)), and a construction permitting recovery is favored (*Massachusetts Bond-*

ing & Ins. Co. v. Texas Finance Corp. (Tex. Civ. App.), 258 S. W. 250, 252), but the undertaking of the indemnitor may not be extended by construction or implication beyond the terms of the contract. (Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 454 (188 P. 982), 42 C. J. S. §8, p. 576).

It is submitted that in the present case, the agreement of Glens Falls is to pay, and as such, then by the *Alberts* case, it is an indemnity agreement against liability, and the appellant is bound to pay to prevent harm or injury to Appellee.

Appellant's argument that there is a complete failure of proof and of findings of fact in regard to appellant's liability on the payment bond is without basis other than his misconception that payment by Radkovich is a prerequisite to liability of Glens Falls. As was pointed out above, the law truly is that under Rule 14(a) the liability of Glens Falls on its bond, whether it be considered to be an indemnity bond against loss and damage or whether it be considered to be a surety bond, is accelerated to allow a third party plaintiff to have judgment against the third party defendant upon the showing that the third party defendant is or may be liable to the third party plaintiff. Finding of Fact X supported by Radkovich's Exhibit C, expressly finds that Glens Falls executed the separate payment bond upon which Radkovich brought in Glens Falls as a third party defendant [R. 195]. Finding XI [R. 196] supported by the evidence [R. 232] expressly found that Woolley did not pay Westinghouse for all the material he bought from Westinghouse, leaving the sum of \$26,952.01 due owing and unpaid from Woolley

to Westinghouse. This finding, adequately supported by the evidence reveals that Woolley did not fully perform his part of the subcontract, and reveals that he did not pay Westinghouse, nor did he hold Radkovich free and harmless. On the strength of this finding and the evidence which supports it, the court made Conclusion of Law II that Glens Falls was liable to Radkovich for the amounts which Radkovich was liable to Westinghouse. This is substantial justice in this matter. The payment bond running to Radkovich was for his protection in the event that Woolley did not pay for materials or labor. Woolley did not pay for all the materials that he used. On this state of facts, Glens Falls should be liable to Radkovich, and the court so held. The judgment against Glens Falls is based on the Findings X and XI [R. 195, 196] which expressly found the bond to have been executed, and found that Woolley did not pay Westinghouse for all the materials purchased by Woolley. These findings of fact give rise to Conclusion of Law II [R. 201] upon which the judgment against Glens Falls and in favor of Radkovich and Sureties is based.

Barron & Holtzoff states Vol. 2, sec. 1131, p. 831:

“On appeal, the appellate court does not retry the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, an appellant seeking to overthrow the findings has the burden of

presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor.”

Anderson v. Federal Cartridge Corp. (C. C. A. 8th, 1946), 156 F. 2d 681;

United States v. Foster (C. C. A. 9th, 1941), 123 F. 2d 32.

This appellant has not done. He argues that the Conclusion of Law II [R. 201] is unsupported by the findings of fact and by the evidence. The record, however, supports not only Findings of Fact X and XI [R. 195, 196], but those findings in turn support the Conclusions of Law II [R. 201] upon which judgment against appellant was based. Apparently appellant's entire argument on this point is based on the misconception that payment by Radkovich is a prerequisite to liability of Glens Falls. Further, appellant's interpretation of the law relative to indemnity agreements against loss may have significance in the State courts, it would not even be controlling there in view of the *Alberts* case which clearly indicates that an indemnity contract which provides for payment is in fact an indemnity contract against liability. Interpreting the agreement of Glens Falls most favorably to appellant, the right of action as given by Rule 14(a) accelerates such a claim and matures it so that a judgment may be rendered upon it in a third party action such as the one before the court.

IV.

There Was no Material Alteration of the Subcontract Such as Would Serve to Exonerate Appellant.

Appellant, relying upon Civil Code 2819, and upon its own interpretation of the facts of this case seeks to lift itself by its own bootstraps. First, it becomes necessary for appellant to interpret the facts as constituting a material alteration of the subcontract, then it becomes necessary to interpret the bonds in question here as requiring the obligee, Radkovich, to give notice to Glens Falls. Appellee does not admit that the subcontract between Radkovich and Woolley was altered or modified in any manner whatsoever nor that notice to Glens Falls was required. This the trial court so found. Finding of Fact XVIII [R. 201] reveals that there was no alteration of the subcontract with regard to the method or amounts of payments, and that there were no material changes or modifications of the plans or specifications referred to in the subcontract.

In his argument, appellant has suggested that the performance bond and the payment bond be interpreted as one agreement. This, Appellee does not agree with, nor did the trial court so find. Rather, Appellee contends that each is a separate instrument, given for a distinct purpose, for which a separate premium was charged, and each depend only upon its own terms and conditions without reference to the other bond. If as appellant contends, the two bonds were to be construed together, then appellant's point relative to a material alteration of the subcontract must fail in its entirety. This for the reason that the surety, Glens Falls, *expressly*

waived notice of modification of the contract in its performance bond [R. 51] wherein the performance bond is quoted as reciting in reference to modifications of the contract "*notice of which modifications to the surety being hereby waived . . .*" It has been held that where a surety waives notice of modifications or consents in advance to such modifications or alterations to the contract, that it is not exonerated by modifications or alterations that thereafter occur.

Wolf v. Aetna Indemnity Co. (1912), 163 Cal. 597;

Roberts v. Security Trust & Savings Bank (1925), 196 Cal. 557;

Bowman v. Maryland Casualty Co. (1928), 88 Cal. App. 481;

Glens Falls Indem. Co. v. Basich Bros. Const. Co., 165 F. 2d 649, cert. den., 68 S. Ct. 1347, 334 U. S. 833, 92 L. Ed. 1760.

Now, if as appellant contends, the two bonds are to be construed together, then Glens Falls has expressly waived notice of the modifications and alterations of the subcontract so as to preclude its exoneration on either bond. On the other hand, as appellee contends, each bond should be construed separately, and if an alteration of the subcontract occurred, the Surety Glens Falls has consented to same.

For still another reason, the argument that there was such a material alteration as would exonerate appellant cannot prevail. In order for such alterations of the principals' subcontract to be effective to work a discharge of the surety, Civil Code 2819 requires that the modi-

fication or alteration be *by some act of the creditor or obligee*. In the present case, the court found that there was no modification of the subcontract. But if the facts did reveal that such a modification did occur, then appellant would have the burden of showing that such alterations of the subcontract were caused by some act of the creditor, Radkovich, or by the provisions of Civil Code 2819, no exoneration would occur. See *Gift v. Ahrnke* (1951), 107 Cal. App. 2d 614, 618, where the court states:

“The appellant bonding company invokes sections 2819-2821 of the Civil Code as exonerating it. Section 2819 declares that a surety is exonerated ‘if by any act of the creditor, without consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.’ This by its own terms would be inapplicable when as here, no alteration or change of position occurred ‘by any act of the creditor.’”

In the case at bar there is no showing that even such minor changes in the subcontract as may have occurred were caused by any act of Radkovich and for this reason Civil Code 2819 afford appellant no defense.

Further, it is the contention of appellee, and the trial court found, that there was no material alteration of the contract. [See Finding of Fact XVIII, R. 201.] The judgment of the trial court gave Woolley judgment for *extras ordered by Radkovich outside the subcontract*. If as appellant argues, the extras were a part of the subcontract there might be some basis for his contention that the subcontract was altered. The findings and evidence

support the judgment that the extras were *outside* the subcontract. Appellee readily admits that the work of the subcontract was performed by Woolley on October 6, 1948. Appellee does not admit that the *subcontract* was in its entirety performed by Woolley at any time. The record is clear and the findings of fact so show that Woolley did not pay Westinghouse for all the materials supplied by Westinghouse to Woolley. This failure of Woolley to pay Westinghouse amounts to a breach of the subcontract by Woolley. The findings of the court were, and they are amply supported by the evidence that any extra work done by Woolley or any extra materials supplied by him were *outside the original subcontract* and did not amount to a material alteration of the subcontract.

Appellant has urged upon the court as an affirmative defense that the subcontract was altered without the consent of the surety. Appellant's burden in establishing such an affirmative defense is to prove the following: (1) that the subcontract was altered (not merely that extra work was done by the subcontractor which was outside the subcontract); (2) that if the subcontract was altered, that such alterations were material; (3) that if the subcontract was altered by material alterations, that such material alterations were made in the subcontract without the consent of the surety, and (4) that if such material alterations of the subcontract were made without the consent of the surety, that the surety was prejudiced thereby.

Roberts v. Security T. & S. Bank (1925), 196 Cal. 557;

Dunne Inv. Co. v. Empire State Surety Co. (1915), 27 Cal. App. 208;

W. P. Fuller & Co. v. Alturas School Dist. (1915),
28 Cal. App. 609;

Bowman v. Maryland Cas. Co. (1928), 88 Cal.
App. 481.

Appellee contends that the question of whether or not the subcontract was materially altered is a question of fact, and a finding of the trial court on such issue will not be disturbed on appeal if supported by the evidence, or if any conflict of the evidence is resolved by the trial court in favor of the finding as made.

Turning now to the findings and the evidence we discover that the trial court resolved any conflict in evidence in the following manner [R. 200]:

“XVIII.

“That there is no evidence from which the Court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the Court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the Court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month.

“That there is no evidence that the terms of the subcontract were altered to change the method and amount of payments to Woolley, and there is no evidence that there was any departure from the terms of the subcontract with reference to the method and amount of payments to Woolley.

“That Radkovich did not take control of said subcontract work; that there were no material changes

or modifications of the plans or specifications referred to in said subcontract.

“That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses.”

This finding spells out in some detail the court's finding of fact that there was no material alteration of the subcontract and the particulars wherein it was not altered, both in regard to manner of payment, and in regard to the plans and specifications covering the work.

Appellant argues that when he speaks of material alteration of the contract that he refers to alteration without the consent of the surety Glens Falls, and suggests that the record is devoid of any evidence that Glens Falls was notified of or consented to any alteration of the subcontract between Radkovich and Woolley. Appellee contends, as the court expressly found [Finding XVIII, R. 201] that there was no material alteration of the subcontract. But, assuming without admitting, that the subcontract was materially altered, the burden of proving that it was done without the consent of the Surety Glens Falls is upon appellant. And this burden he has not met. Appellant included as a part of its answer as Exhibit “B” the performance bond executed by appellant and Woolley for the benefit of Radkovich [see R. 50-51]. This bond contains an express waiver by appellant Glens Falls of the notice of any modification of the subcontract in the following language:

“Now, therefore, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and

any extensions thereof that may be granted by the
with or without notice to the Surety,
and during the life of any guaranty required under
the contract, and shall also well and truly perform
and fulfill all the undertakings, covenants, terms, con-
ditions and agreements of any and all duly authorized
modifications of said contract that may hereafter be
made *notice of which modification to the Surety be-
ing hereby waived*, then this obligation to be void;
otherwise to remain in full force and virtue.” (Em-
phasis added.)

Appellant has advanced argument that the two bonds should be construed together. If so, the above emphasized waiver would serve to constitute an advance consent by the Surety as to each bond to any alterations or modifications of the subcontract. Appellant's dilemma is one of urging on one hand that the contract was materially altered without the consent of appellant, and on the other hand having pleaded as an exhibit to his answer an express waiver of right to notice of any modification. It is a well established principle of law that such advance waiver by a surety constitutes consent to modification of the subcontract and will preclude exoneration of the surety if such modification does subsequently occur.

Blackwood v. McCallum (1922), 187 Cal. 655;

Wolf v. Aetna (*supra*);

Roberts v. Security T. & S. Bank (*supra*);

Bowman v. Md. Cas. Co. (*supra*).

The question of whether or not any modification of the subcontract was material is one of fact and upon the trial court's determination that whatever alteration or modification of the contract as might have occurred was

not material, the appellate court will not reverse in the absence of a showing that such resolution of the conflicting evidence is clearly erroneous. The trial court found that there was *no* alteration of the subcontract. The evidence before the court in regard to changes in the plans and specifications, in regard to the items covered by the subcontract, and in regard to the time and method of payment was in conflict. This conflict of the evidence was resolved in the finding that there was no material alteration of the subcontract and no change in the manner or time of payments. The burden of proving such a material alteration of the subcontract as would exonerate appellant was squarely upon appellant, and if the court was presented insufficient evidence to find in appellant's favor, it is a failure of appellant to meet its burden of proof, of which it cannot complain upon appeal.

B. There Was no Alteration of the Subcontract by Furnishing Materials and Doing Work Not Within the Subcontract.

Conflicting evidence was presented to the trial court relative to four different items, namely: *bell circuits, telephone circuits, closet lights* and *fixtures*. Radkovich contended that they were included in the original subcontract. Woolley, on the other hand, contended that they were extra items for which he should receive extra compensation. Faced with this conflicting evidence, the court found in Finding of Fact XV [R. 198] the following:

“That the special instance and request of Radkovich Woolley furnished additional labor and materials not required under the prime contract, the subcontract nor under any changes or modifications of said contracts, but which were furnished to be used and were actually used in additions to the structures

and improvements covered by said contracts. That said labor and materials consisted of the following items, the cost and reasonable value of which are as follows:”

Then follows a listing [R. 198] of the various items together with a figure indicating the reasonable value of the labor and materials involved in each item, together with a finding that no part of the total sum of \$8,277.67 had been paid by Radkovich to Woolley. This finding specifically covers each item which appellant urges upon this court constituted an alteration or modification of the subcontract. The issue thus raised by appellant of the defense of material alteration of the contract was effectively disposed of by Finding XV [R. 198] wherein it was specifically found that *all these extras* constituted no part of the subcontract nor of any change or modification to the subcontract. They were extras outside the subcontract, for which Woolley was allowed \$8,277.67 in the judgment of the trial court. Appellant urges that a written contract can be altered or modified by an executed oral contract, and with this statement of the law, appellee does not take issue. Appellee does take issue with appellant's contention, however, in its relation of the facts of the case at bar to the law as stated. Whether or not the supply and installation of the extra items constituted a modification of the subcontract or a separate agreement is a question of fact, which fact has been resolved in Findings XV [R. 198] and XVIII [R. 200] to the effect that they did not constitute an alteration of the subcontract. Appellant argues that such additional items required a re-routing and redesigning of the tubing and outlet boxes provided in the original contract. To this argument it need only be observed that all the houses were wired

in the same manner and that if whatever change in tubing that was made constituted a change in the subcontract, it was not deemed by the trial court to be material. Further, the fact that the payments as made did not indicate a distinction between what was covered by the subcontract and what was an outside extra is not conclusive. In fact, the court found that the value of such extras was \$8,277.67 and that Woolley had not been paid any of this amount and gave judgment in the action for Woolley in that amount. This finding effectively negatives appellant's argument that the extras were not segregated for purposes of payment. Until the court determined that they were extras outside the contract, Radkovich had contended that they were a part of the original subcontract. The court's finding that they were no part of the subcontract and that Woolley had not been paid for them resolved the factual differences between Woolley and Radkovich in favor of Woolley and the judgment for \$8,277.67 for these extras established that any payments made by Radkovich did not cover those items.

Appellant contends that Radkovich should be estopped to deny the validity of the oral contract for the extras, or as he puts it for the oral modification to the subcontract. The trial court in giving judgment for Woolley effectively protected Woolley's rights to be paid for the extra work and material he performed and supplied outside the subcontract. Radkovich is not at this late date being permitted to contend that he did not order the extras, nor is he being permitted to avoid payment therefor, inasmuch as judgment in favor of Woolley was given for the amount of these extras. The fact that Radkovich erroneously contended that these extras were a part of the subcontract cannot now be used to estop the trial

court from finding as it did that they were extras and were not a part of the subcontract. Appellant would seek to use Radkovich's erroneous contentions to estop the trial court from holding that such extras were not a part of the subcontract. There is no doubt but that Woolley performed extra work. This the court found and for this it gave him judgment. But the court did not find that the extras for which Woolley was paid were modifications of the subcontract. Nor is there any evidence upon which such a finding can be made. An appellant who attacks the findings of a trial court has the burden of showing that the findings are not supported by the evidence, or that there is a preponderance of evidence in favor of some other finding. Appellant has not been able to point to any evidence which would support a finding that these extras constituted a modification of the subcontract.

In the absence of such evidence that the extras were modifications of the subcontract, the question of their materiality is academic. No doubt the value of the extras in amount equalled in excess of 10% of the subcontract price. But where the evidence supports the finding that such extras were not a part of the subcontract or an alteration thereof, the extent of the extras in relation to the subcontract has no relevancy to the question of whether or not the subcontract was *materially* altered. Appellant had the burden of proving that the contract was altered before the question of whether or not such alterations were material would ever arise. Failing to prove the contract was altered at all, the question of the materiality never arises.

Appellant suggests that Radkovich relied upon economic coercion to compel Woolley to complete his performance

of the subcontract (Br. 81). There is no doubt but that Woolley was in great financial distress, otherwise this entire lawsuit might not have occurred. Regardless of this, Radkovich's insistence was only within his prerogatives as general contractor to insist that Woolley perform his contract or Radkovich would secure the services of another subcontractor. It should be noted that the subcontract called for a completion date by Woolley of April 15, 1948 [R. 43] and that this purported economic coercion occurred on June 14, 1948, some sixty days after Woolley had agreed to complete the subcontract, and at a time when Woolley had walked off the job refusing to continue performance. Appellants contend that this was a lack of good faith on Radkovich's part with reference to Glens Falls. It is submitted that had not Radkovich persuaded Woolley to return to the job, that Glens Falls would have been liable for completion of the *work* under its performance bond as well as for payment of materials under the payment bond, and the efforts of Radkovich in causing Woolley to return to the job were directly for the benefit of appellant for which it should not complain.

Appellant's quotation from *First Congregational Church v. Lowery* (1917), 175 Cal. 124, 125, 126, 165 Pac. 440, taken out of context would lead this learned court to believe that the finding of the court was that the alterations were *not material* and that nevertheless the surety was exonerated. This misinterpretation of the case cannot be allowed to go unchallenged. What the *Lowery* case really held was that the alterations *were material* within the meaning of existing decisions and for this reason reversed the trial court which had found the alterations not to be material. It has been held also in the case of premature payments, that such do not discharge a compen-

sated surety unless surety is prejudiced by same. (*Dunne Inv. Co. v. Empire State Surety Co.* (1915), 27 Cal. App. 208, 150 Pac. 405, 411.) Further it is well established that permitted alterations will not release the surety. (*Bowman v. Md. Cas. Co.* (1928), 88 Cal. App. 481, 263 Pac. 826.) Where a surety consents to the alteration of the contract it cannot complain. (*Smith v. Thomsen* (1935), 8 Cal. App. 2d 603, 48 P. 2d 102.) Further, where a contract provides for changes, the surety is not released by such changes. (*Simpson v. Bergman* (1932), 125 Cal. App. 1, 13 P. 2d 531.) In short, the rule of *strictissimus juris* as it formerly applied to gratuitous sureties is not applicable in California to compensated sureties. (*Bond v. Holloway* (1920), 45 Cal. App. 634, 188 Pac. 577; *Hunstock v. Royal Securities Corp.* (1921), 51 Cal. App. 769, 197 Pac. 963. See also, 12 A. L. R. 382.)

C. There Were no Premature Payments Under the Subcontract Such as Would Exonerate Appellant.

Appellant distorts the court's findings of fact to insist for its own purposes that the \$4,000 loaned to Woolley by Radkovich was in fact a premature payment. Radkovich testified that it was a loan [R. 262] including the arrangements by which the loan should be repaid. Woolley testified that it was a loan [R. 428]. There is absolutely no other evidence, testimonial or documentary, that contradicts this corroborated testimony that the \$4,000 was a loan by Radkovich to Woolley. Further, the record [R. 262] reveals that Radkovich repaid himself from a subsequent payment as agreed. Had this been a payment and not a loan, the money would have become Woolley's and Radkovich could not have offset the \$4,000 against the latter payment. In the minds of the parties to the trans-

action, as evidenced by their testimony and by their actions this was clearly a loan.

Both Woolley [R. 428] and Radkovich [R. 262] testified that Radkovich charged Woolley \$500 for making this loan. Appellant now seeks to twist this admitted \$500 loan charge into becoming a reduction of \$500 in the subcontract price. There is absolutely no evidence to support appellant's contention that this was a reduction in the subcontract price. Rather, this is the effort of appellant to try to subvert the true intentions of Radkovich and Woolley so as to release appellant from its just obligation, which it entered for compensation, and for which it received and retained the premium paid. The finding of fact [Finding XVII, R. 200] on this point is that \$4,000 was loaned to Woolley by Radkovich for which loan Woolley promised to and did pay to Radkovich the sum of \$500 as interest. The same finding of fact explicitly negates the possibility that this was a premature payment. And this finding is supported by the evidence [R. 262, 428]. In the face of this express finding of fact supported by the only evidence on the subject, appellant now argues that this was a premature payment. Barron & Holtzoff, Federal Practice and Procedure, Volume 2, page 831, states:

“On appeal, the appellate court does not retry the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor.”

It is submitted, that appellant is here seeking to overthrow a finding of fact that is adequately supported by the evidence and that the burden of presenting a record that shows that the weight of the evidence does not support this finding is upon the appellant seeking to overthrow such finding of fact. Appellant has not met his burden of showing that the evidence does not support the finding of fact. On such a state of the record the findings of fact should not be disturbed. The trial court found [Finding of Fact XVII, R. 200] that Radkovich loaned Woolley \$4,000 and charged him the sum of \$500 interest. This finding of fact is supported by the evidence [R. 262, 428]. Appellant's arguments to the contrary, however, are not supported in any manner whatsoever by the evidence in the record. Where an appellant seeks to overthrow a finding of fact the burden is upon him to show that the evidence compelled a finding in his favor. (*Anderson v. Fed. Cartridge Corp.* (C. C. A. 8th, 1946), 156 F. 2d 681; *United States v. Foster* (C. C. A. 9th, 1941), 123 F. 2d 32; *Grace Bros. v. C. I. R.* (C. A. 9th, 1949), 173 F. 2d 170.) Further, upon appeal the presumption is that the finding of fact is correct and will not be set aside unless clearly against the weight of the evidence. (*Wingate v. Bercut* (C. C. A. 9th, 1945), 146 F. 2d 725; *Coleman v. United States* (C. A. D. C., 1949), 176 F. 2d 469; *Seven-Up v. Cheer-Up Sales Co. of St. Louis, Mo.* (C. C. A. 8th, 1945), 148 F. 2d 909, cert. den., 66 S. Ct. 32, 326 U. S. 727, 90 L. Ed. 431.)

Appellant next seeks, by juggling figures, to correspond with what appellant has assumed the facts to be, to demonstrate that Woolley was overpaid by Radkovich as of the second estimate. Contrary to this assumed fact is

the Finding of Fact XVIII [R. 200] which reads in part as follows:

“That there is no evidence from which the Court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the Court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the Court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month.

“That there is no evidence that the terms of the subcontract were altered to change the method and amount of payments to Woolley, and there is no evidence that there was any departure from the terms of the subcontract with reference to the method and amount of payments to Woolley . . .”

The court's attention is directed to the fact that the burden of proving the defenses which appellant advances as his second and fourth affirmative defenses is squarely upon appellant. As the trial court found [Finding of Fact XVIII, R. 200, 201] there was insufficient evidence from which the court could ascertain whether or not any premature payments had been made, the appellant has failed in his burden of proof and cannot now urge upon appeal that the court erred in finding as it did. The method and amounts of payments to Woolley were spelled out in the subcontract [R. 45] and in Article 16 of the prime contract [Radkovich Ex. B]. By these provisions the general contractor is given considerable discretion in regard to the amount of payments. By the provisions of Article 16 of the principal contract the general contractor

was to be paid as the work progressed on monthly estimates made and approved by the contracting officer. In preparing these estimates the material delivered on the site and preparatory work was to be taken into consideration. The consideration was to have been paid to the subcontractor upon invoices and vouchers surrendered therefor in such manner and form as should be prescribed by the contractor [R. 45]. There is nowhere spelled out in the subcontract or in any of the provisions of the general contract which have application to the payment by the principal contractor to the subcontractor what percentage should be paid by the principal contractor to the subcontractor in any one month. Nor is it spelled out that the principal contractor was obligated to make his estimates in one manner rather than another. Payment to the subcontractor on a monthly basis determined by the percentage of work done and materials supplied by the subcontractor, is no more prescribed by the subcontract than was payment on a unit basis of a certain number of dollars per house. The progress of the subcontractor was just as well measured by the number of units completely finished in reference to the total number of units to be constructed as by any other means of measurement.

Appellant next cites *Pacific Coast Engineering v. Detroit Fidelity and Surety Co.* (1931), 214 Cal. 384, as authority that what occurred in the instant case amounts to a premature payment by Radkovich to Woolley such as would exonerate appellant surety. The *Pacific Coast* case is distinguishable on its facts however, as in that case the plaintiff was *relying upon the \$1,000* he had advanced to the contractor, not as a loan but as a payment under the contract. It is to be noted that in that

case the bond sued upon was the faithful performance bond where the court set down the following rule (p. 395):

“That if the *premature payment* made by the obligee without the knowledge or consent of the surety *is one upon which the plaintiff is relying* and is dependent for a recovery against the surety, then the payment has materially altered the principal's obligation, the injury to the surety is established, and the surety is exonerated by virtue of the provisions of section 2819 of the Civil Code.”

(P. 396):

“In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the \$1,000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found.” (Emphasis added.)

Clearly, where as in the present case, the trial court found that the \$4,000 was a *loan*, and where the evidence *supports such a finding*, and where the obligee is *not relying upon such loan* as a premature payment, then the rule of the *Pacific Coast* case can have no application. In the present case, Radkovich and Woolley treated the transaction as a loan, and nowhere is it indicated that Radkovich was relying upon this \$4,000 as a premature payment under the contract. Neither Radkovich nor Woolley treated the \$4,000 as a payment within the subcontract. Appellant cannot reconstruct the intentions of Radkovich and Woolley to defeat its liability.

See also:

Bateman v. Mapel (1904), 145 Cal. 241.

D. Any Change in the Method of Payment Did Not Amount to a Material Alteration of the Subcontract.

Appellant contends that the method of calculating progress payments was changed and that this change constituted an alteration of the subcontract sufficient to release appellant.

Finding of Fact XVIII [R. 201] reveals that upon a consideration of the evidence before it, that it found that the subcontract was *not* altered to change the methods and amount of payment and that there was no departure from the terms of the subcontract in regard to the method and amount of payments to Woolley [R. 201]. This finding of fact is based upon the testimony of Woolley and of Radkovich together with an interpretation of what the subcontract provided in this regard. The subcontract provides in part [R. 45]:

“The aforementioned consideration shall be paid to the sub-contractor upon invoices and vouchers surrendered therefor, in such manner and form as shall be prescribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion, affecting the generalities of the references to the principal contract and the agreements of the sub-contractor hereunder to be bound thereby, payments shall be made by the contractor to the sub-contractor only in accordance with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the subcontractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of Article 16.”

Clearly this portion of the subcontract allows the principal contractor, Radkovich to determine what manner and form of vouchers he shall require as a basis for calculating payments to Woolley. At the beginning of the contract, before any houses were completed, vouchers showing the material on hand and the labor done were required [R. 426]. Later in the contract when units were being completed daily, the amount of progress could be ascertained by relating the number of units completed to the total contract [R. 430]. On this basis calculations as to progress made which served as a basis for payment to Woolley could just as well be made. The court's finding that the method and amount of progress payments was not changed is consistent with the provision of the subcontract and Article 16 of the principal contract. Further, appellant cites no portion of the record which would support its contention that the method of calculating the progress payments was changed. The burden upon appellant in this appeal is to demonstrate to the appellate court that the findings of fact are clearly not supported by the evidence. This appellant has not done, and it is submitted, cannot do by reference to the record on appeal. In the absence of such a clear showing that the findings are not supported by the evidence, the appellate court will not overthrow the trial court's findings of fact on any issue.

E. The Findings of Fact in Regard to Alteration of the Subcontract Are Adequate.

Appellant's argument that there were no findings of fact on the substantial question of alteration of the subcontract requires no more than a reference to the record to impeach it. The following tabulation demonstrates appellee's point:

APPELLANT CONTENDS

THE RECORD SHOWS

1. That additional materials and labor were added to the subcontract.

1. Finding of Fact [R. 198] expressly finds that such additional materials and labor were "not required under prime contract, the subcontract, nor under changes or modifications of said contracts." They were *extras*.

2. That the subcontract price was reduced by \$500.

2. Finding of Fact XV [R. 200] that this was an interest payment. See also [R. 262, 42]

3. That Woolley was paid a substantial sum of money before it was earned.

3. Finding of Fact XV [R. 200] "there is evidence from which Court can ascertain whether in one month Woolley was paid more or less than was due for that particular month."

4. That the method of payment was changed.

4. Finding of Fact XV [R. 201] "there is evidence that there was any departure from terms of the subcontract with reference to the method and amount of payments to Woolley."

This reference to the record reveals that the contentions of appellant are not supported by the record. There were adequate findings on all the points relied upon by the appellant as alterations of the subcontract. All these matters were relied upon by appellant as affirmative defenses, and as affirmative defenses the burden of proof was upon appellant. If there was insufficient evidence upon which to make a finding upon a matter concerned in an affirmative defense, it is a failure of the appellant to sustain his burden of proof. For his own failure in this regard he should not now be heard to complain upon appeal. Barron & Holtzoff, Vol. 2, sec. 1133, p. 834 states:

“Findings of fact are not ‘clearly erroneous’ unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellant court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence *de novo*.”

“In considering whether trial Court’s findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence.”

That the appellees must be given the benefit of all inferences in favor of the findings of fact and that the court on appeal cannot set aside the findings unless clearly

erroneous see *United States v. Ore. State Med. S*
(1951), 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 928.

Appellant's objection that there is no finding in regard to the alteration by method of payment is effectively nullified by reference to Finding of Fact XVIII which finds specifically on the exact point of material alteration of the subcontract. [R. 201]. Where the proof was insufficient for the court to make a finding of fact on an issue raised as an affirmative defense, such failure of proof is a failure of the appellant and it should not be permitted to take advantage of its own failure of proof to set aside the judgment. In the absence of a finding of fact, the appellate court should not pass on a controverted issue. (*Hazeltine Corp. v. Crosley Corp.* (C. C. A. 3rd, 1942) 131 F. 2d 34.)

It has been held that findings of fact are sufficient if they support the ultimate conclusion. The trial court is not required to make findings on all the facts presented or to make evidentiary findings. (*Norwich Union Indemnity Co. v. Haas* (C. A. 7th, 1950), 179 F. 2d 827.) Thus where, as in the present case, the court found [Finding of Fact XVIII, R. 201] that there was no evidence of change of method of or amount of payment and there were no material changes or modifications in the plans or specification, such finding is one of ultimate fact and adequate to support Conclusion of Law II [R. 201].

V.

Judgment as Based on Performance Bond.

Although appellee contends that the judgment is based primarily upon the payment bond and not upon the performance bond, certain contentions of appellant in regard to the performance bond cannot be allowed to go unchallenged. Appellant cites Findings of Fact XIII [R. 197] and XVI [R. 199] as holding that Woolley did fully perform the subcontract. Neither of these findings so states. In fact, the court had this very question brought to its attention during the time the findings of fact were being prepared by the appellant's objections to the proposed findings of fact, and by the letter of counsel for appellee relative to this very point [R. 166, 184]. Both Findings of Facts XIII and XVI refer to the completion by Woolley of the "*subcontract work.*" This is a far cry from holding that Woolley fully performed the subcontract. Full performance included the payment to Westinghouse in full. This Woolley did not do as the court found in Finding of Fact XI [R. 196], which fact even appellant cannot refute. In the Court's Memorandum of Conclusions [R. 97] the court pointed out that it was conceded at the trial that the amount now due Westinghouse is the sum of \$26,952.01. The stipulation by counsel for appellant and counsel for Woolley that this amount was not paid by Woolley to Westinghouse and was due and owing is to be found in the record, page 232. This stipulation demonstrates that Woolley did not perform the subcontract in its entirety for admittedly he did not

pay Westinghouse in full. Thus the finding of the court is supported by the evidence, especially in view of the stipulations of counsel that Woolley did not pay Westinghouse in full for the materials supplied by Westinghouse. Thus it may be seen that Conclusion of Law II [R. 201] is supported by the findings of fact and the evidence insofar as it relates to the performance bond.

VI.

Compliance With Conditions Precedent as Affecting Recovery Upon Performance Bond.

Appellant next contends that appellee's recovery cannot be predicated upon the performance bond because it is argued Radkovich did not comply with express conditions precedent in that bond. This matter was not in issue in the trial. Appellant in all his seven affirmative defenses did not once even mention the word condition precedent. Such matters are the subject of an affirmative defense and if not pleaded are waived. (*Std. Oil Co. v. Houser* (1950), 101 Cal. App. 2d 481, and cases therein cited; *Jack Mann Chevrolet Co. v. Associates Inv. Co.* (C. C. A. 6th, 1942), 125 F. 2d 778; *State Farm Mut. Auto. Ins. Co. v. Koval* (C. C. A. 10th, 1944), 146 F. 2d 118). See also Federal Rules of Civil Procedure 12(h) providing that affirmative defenses not raised by answer are deemed waived and see *Phillips v. Baker* (C. C. A. 9th, 1941), 121 F. 2d 752, certiorari denied, 61 S. Ct. 301, 314 U. S. 688, 86 L. Ed. 551.

Appellant next refers to his own arguments and assumptions as though they were facts and urges that there were changes in performance, contract price, and method

of payment. These contentions of appellant are effectively negated by the express finding of fact on these issues [Finding of Fact XVIII, R. 200, 201] and by the record of the evidence in support of such findings.

Appellant cites *Union Indemnity v. Lang* (C. C. A. 9, 1934), 71 F. 2d 901 and *Schwab v. Bridge* (1915), 27 Cal. App. 204 for the proposition that appellant should be exonerated because appellee did not give adequate notice to appellant. *Schwab v. Bridge* was decided before the changes wrought in the law of suretyship in California in 1939. One of the distinctions that existed before that time was that a guarantor was primarily liable on his contract of guaranty while a surety was only secondarily liable. In 1939 the distinction was abolished. Today, by the provisions of Civil Code 2807, a surety is liable to the creditor immediately upon the default of the principal and without demand or notice.

As to the failure of Radkovich to notify Glens Falls of Woolley's financial condition and ability to perform the contract, this is the very thing that appellant Glens Falls guaranteed to Radkovich, with notice to which appellant is charged. *Glens Falls Indemnity Co. v. Basich Bros. Const. Co.* (1948), 165 F. 2d 649, 652; *Sherman v. American Surety Co.* (1918), 178 Cal. 286, 173 Pac. 161.

It should be noted that what Radkovich and his sureties seek in this case is not further performance of the subcontract work by Woolley or damages for non-performance of the work under the subcontract, but is payment under the payment bond for sums for which they have been held liable and have now paid because of Woolley's failure to pay Westinghouse. Appellee's judgment

could have been based upon the payment bond alone. It could also have been predicated upon the performance bond, for as part of Woolley's performance of the subcontract, he was obligated to pay for the material supplied by Westinghouse and incorporated into the job.

VII.

Condition Precedent of Performance of Subcontract.

Appellant has not presented the question of the performance of the subcontract by Radkovich as an affirmative defense. Not being pleaded, such affirmative defenses are waived. (See *supra* part VI). Appellant next suggests that the burden of proving that Woolley was paid in accordance with the contract was upon appellee. Nothing could be farther from the law. Appellants have pleaded premature payments and material alteration of the subcontract as affirmative defenses. [See Second and Fourth Affirmative Defenses, R. 38, 39]. The burden of proving these affirmative defenses is upon appellant. By the Finding of Fact XVIII [R. 200, 201] that there was insufficient evidence to show that Radkovich paid Woolley more in any one month than he was entitled to, it is evident that appellants failed to meet their burden of proof and now seek to affix this failure to meet their own burden of proof upon appellees. Further, such condition has no application to the payment bond, which could have been the basis of the trial court's decision.

VIII.

Finding of Fact XVIII Is Supported by the Evidence.

The best that can be said of appellant's argument that Finding of Fact XVIII is not supported by the evidence is that the evidence was to some degree conflicting. This conflict of the evidence has been resolved by the trial court in the manner set forth in Finding of Fact XVIII. Where conflicting evidence has been resolved by the trial court the appellate court will not set aside the trial court's findings unless clearly against the weight of the evidence. (*Paramount Pest Control Service v. Brewer*, (C. A. 9th 1949), 177 F. 2d 564). And the burden of showing that such findings are opposed to the weight of the evidence is upon an appellant who seeks to overthrow the findings of fact. (*Anderson v. Federal Cartridge Corp.* (C. C. A. 8th 1946), 156 F. 2d 681). The appellate court takes the view of the evidence most favorable to the appellee. (*Paramount Pest Control Service v. Brewer* (C. A. 9th 1949), 177 F. 2d 564). As to the four alleged alterations of the subcontract, the court expressly found against appellant that the subcontract was not altered by extra materials [Finding XV, R. 198]; that the \$500 was an interest charge and not a reduction in contract price [Finding XVII, R. 200]; that there were no premature payments [Finding XVIII, R. 200]; and that the method of payment was not altered [Finding XVIII, R. 201]. The burden of proving these defenses was on appellant which burden appellant has not sustained.

As to the defense of failure to state a claim the court in its Memorandum of Conclusions [R. 127] expressly indicated its opinion that the Radkovich cross-claim did state a claim against the appellant upon which relief could be granted. Finding of Fact XVIII effectively disposed of this affirmative defense by the finding that Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses.

IX.

Construing Payment Bond With Performance Bond.

Finding of Fact X [R. 196] indicates that two different bonds were written. The memorandum of Conclusions [R. 115] indicates that the court's opinion was that there were no such conditions in the payment bond as were in the performance bond. [R. 49]. This same Memorandum of Conclusions [R. 116] indicates that the court considered the two bonds to be separate instruments and not to be construed together. Also, the subcontract itself provides for two separate bonds for two separate purposes [R. 45, 46].

The reason for two bonds is obvious. One is to assure Radkovich that Woolley would perform the contract or that if he failed Glens Falls would cause the work to be done or would pay Radkovich. The other bond, the payment bond, is for Radkovich's protection in the event that Woolley did complete the subcontract work but failed to pay material suppliers, as he did in this case. Because

it was a United States government job, and because a Miller Act bond was required and was executed, the suppliers of Woolley could, as Westinghouse did, enforce payment by Radkovich and his sureties. To protect himself and his sureties, Radkovich required the payment bond.

Also, the reasons for the conditions in the performance bond, and the absence of conditions in the payment bond are equally obvious. What Glens Falls guaranteed by the performance bond was the performance of the work of the subcontract by Woolley. This subcontract being between Radkovich the obligee on the bond and Woolley, the principal, it is obvious that Radkovich had it in his power to increase the surety's burden. Thus the conditions were imposed in the performance bond in order to assure Glens Falls that Radkovich would not be able to increase its burden by any action of Radkovich's. The payment bond on the other hand, guaranteed Woolley's performance to third parties, his materials suppliers such as Westinghouse. As to this payment by Woolley to these third parties, Radkovich's activities could have no effect. Thus no conditions relating to Radkovich were imposed upon the obligee, Radkovich in the payment bond.

In California it has been held that where two separate bonds are given that the conditions of one will not be incorporated into the other bond so as to preclude recovery on that bond.

Maryland Casualty Co. v. Shafer (1922), 57 Cal. App. 580;

Summerbell v. Weller (1930), 110 Cal. App. 406;
Lamson Co. Inc. v. Jones et al. (1933), 134 Cal.
App. 89.

Apparently, appellant did not contemplate that the two bonds should be construed together or that the conditions of the performance bond, otherwise he would have pleaded this as an affirmative defense, which he did not do.

X.

The Trial Court's Judgment Against Glens Falls Is Supported by the Record.

Apparently abandoning his arguments that the items contained in Finding of Fact XV [R. 198] are included in the subcontract, appellant argues that it was error for the court to give judgment against appellant for items outside the subcontract. This is a misconception of the judgment.

Paragraph I of the judgment gave Westinghouse judgment against Radkovich and his sureties for certain sums of money [R. 201]. Paragraph II of the judgment gave Radkovich and his sureties judgment in like amount against Woolley and Glens Falls [R. 201]. Were the judgment to stop here, there would be some merit in appellant's contentions. But paragraph III of the judgment gave judgment to Woolley and Glens Falls against Radkovich and his sureties for \$15,249.69 [R. 202], which sum includes all the extras found by the court to be outside the subcontract in Finding of Fact XV, together with \$6,264.16 found by the court to be due to Woolley [Find-

ing of Fact XIV, R. 198] and the sum of \$107.86 due to Woolley for replacement of units damaged by faulty construction by Radkovich [R. 199].

Thus it may be seen that Woolley and Glens Falls got judgment as an offset against the judgment rendered in favor of Radkovich for all the extra materials and labor which Woolley supplied, so the net effect is that Glens Falls is not being charged for items which were not supplied under the subcontract, as for these items judgment was given for Woolley and Glens Falls. In addition, paragraph IV [R. 202] of the judgment gave Woolley damages for some delay caused by Radkovich in the sum of \$949.22 and expressly gave Glens Falls the right to apply this amount to diminish the amount if any paid by it under the judgment. Clearly both Woolley and Glens Falls were given judgment for all that the court found them entitled to, so there is no error in the judgment in this request.

Conclusion.

The District Court had jurisdiction to hear and decide all the issues presented in this entire controversy. The jurisdiction over the Westinghouse action is based upon Federal statute. The cross-claim or third party claim of Radkovich is clearly ancillary to the principal action and thus within the jurisdiction of the District Court. The procedure of bringing in such third party defendants as appellant is expressly provided by Rule 14(a) of the Federal Rules of Civil Procedure.

The findings of fact made by the trial court are adequate as ultimate findings of fact and are supported by the evidence. Appellant did not meet its burden of proof as to its affirmative defenses, and on this appeal has failed to demonstrate that the findings of fact were clearly erroneous or against the weight of the evidence. The judgment should be affirmed.

Respectfully submitted,

ANDERSON, MCPHARLIN & CONNERS,

By KENNETH E. LEWIS,

*Wm. Radkovich Company, Inc., a Corporation,
United Pacific Insurance Company, a Corporation,
General Casualty Company of America, a Corporation, Excess Insurance
Company of America, a Corporation,
Manufacturers' Casualty Insurance Company, a Corporation, Appellees.*

No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, Wm.
RADKOVICH COMPANY, INC., *et al.*

Appellees.

APPELLANT'S REPLY BRIEF.

JOHN E. McCALL,
J. HAROLD DECKER,
ALBERT LEE STEPHENS, JR.,

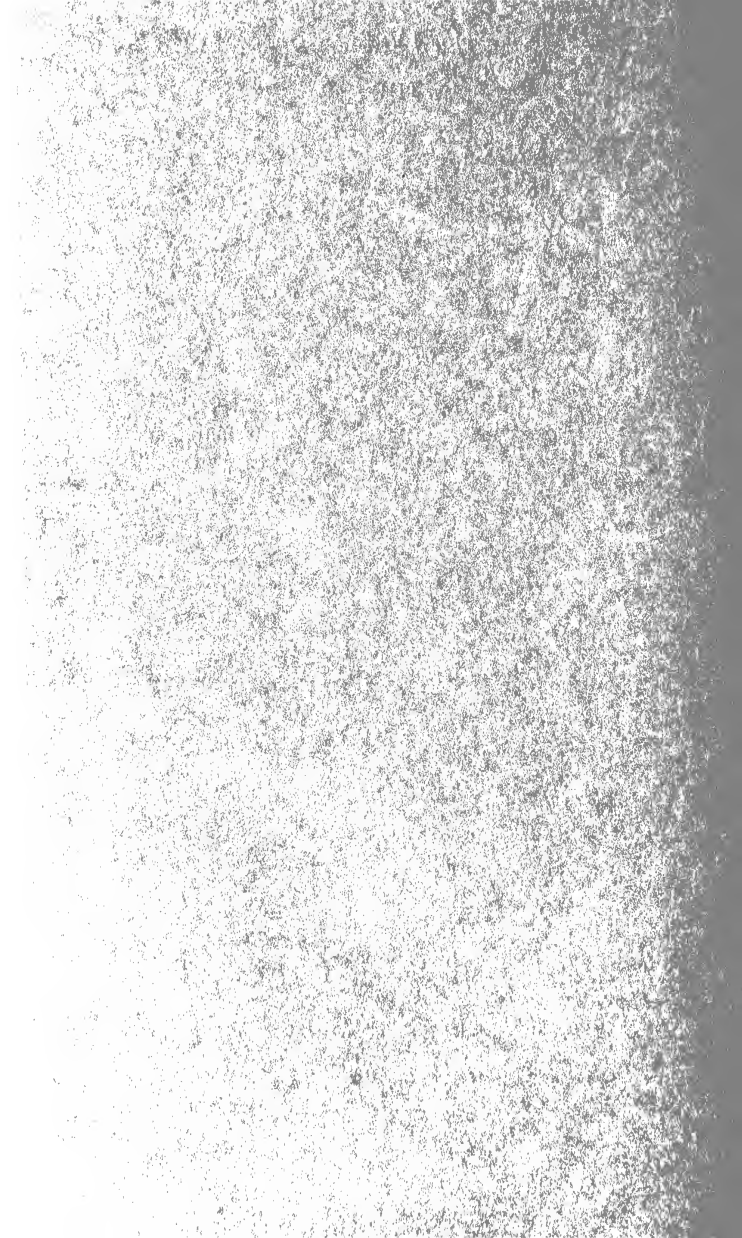
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FILED

JAN 11 1955

PAUL P. O'BRIEN,
CLERK



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No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, WM
RADKOVICH COMPANY, INC., *et al.*

Appellees.

APPELLANT'S REPLY BRIEF.

I.

Ancillary Jurisdiction of the Radkovich Cross-Claim.

The argument of Appellees is that the action against Woolley was ancillary to the main action and consequently needed no independent jurisdictional grounds and that therefore a cross-claim against Woolley was authorized by Rule 13g and hence Glens Falls could be brought in under Rule 13h.

They cite the *Par-Lock* case.* This case is not authority for the idea that in such an action, litigation concerning

**United States to the Use and Benefit of Par-Lock Appliers of N. J. v. J. A. J. Const. Co., et al.* (D. C. E. D. Pa., 1943), 49 Fed. Supp. 85, affd. 137 F. 2d 584.

the subcontract is ancillary. Diversity existed between the litigants in the *Par-Lock* case, so the question was simply a question of joinder and not of jurisdiction.

Appellees concede that the *Westinghouse v. Woolley* part of the action is founded upon private contract. But they assert that no independent jurisdictional facts need to be alleged or need to exist. They argue that the *Westinghouse v. Woolley* part of the action is ancillary to the Miller Act suit. It is not ancillary because of Rule 13, since it is not a cross-claim or counterclaim. It is a part of the main action.

Appellant asserts that the action against Woolley is not necessary for complete relief under the Miller Act. The case at bar sufficiently demonstrates the fact, for Westinghouse stepped out of the case immediately because all parties conceded its right to be paid by Radkovich and Radkovich's sureties, as principal and sureties, respectively, on the Miller Act bond. The remaining question is whether the action thus brought can operate as a vehicle to permit adjudication of other quarrels which normally should be litigated in the State Courts.

The fact that the claim against Woolley is actually a collateral matter is exemplified by the fact that the trial court didn't even bother to enter a judgment against Woolley. This has not disturbed Appellees in the least. In fact, it probably has never even been noticed. Could it be that this action on another contract obligation is so closely related to the main action as to require its adjudication whether independent grounds of jurisdiction exist or not? We think that the obvious answer is, no. It was so unimportant and collateral that it was lost in the shuffle.

It would appear, therefore, that Appellant's analysis of Woolley's position in the action has not been impeached. Jurisdiction over this phase of the case depends upon diversity which was neither alleged nor proved. Insofar as Appellees' claim that Rule 13 authorizes the action against Glens Falls is concerned, the claim falls for want of jurisdiction when it appears that there is no jurisdiction for plaintiff's claim against the co-party thus sued pursuant to Rule 13g (Woolley) and there is no place for application of Rule 13h.

We invite the court's attention to *New Orleans Public Belt R. Co. v. Wallace* (C. C. A. 5, 1949), 173 F. 2d 145, 148, and quote from page 148:

"Left for consideration is the correctness of the ruling of the court below in dismissing the cross-claim, but that consideration will not be extensive, for at the very outset, we find it unnecessary to pass upon that question: No cross-claim could be asserted against T. Smith & Son, Inc., by its codefendant, Public Belt Railroad Commission, because obviously the trial court had no jurisdiction of the claim asserted by the complainant against T. Smith & Son, Inc. As heretofore pointed out, the cause of action against the Belt Railroad arose under the Federal Employers' Liability Act; that against T. Smith & Son, Inc., arose under the tort law of Louisiana. All parties are citizens of Louisiana. Referring to the general rule that a federal court having acquired jurisdiction by reason of a substantial federal question involved has the right to decide all questions in the case, the Supreme Court in *Hurn v. Oursler*, 289 U. S. 238, 245, 53 S. Ct. 586, 589, 77 L. Ed. 1148, said:

“* * * the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the nonfederal cause of action.’”

See also, *O'Brien v. Richtarsic* (D. C. W. D. N. Y., 1941), 2 F. R. D. 42, 45, wherein the court states:

“Further, this court had no jurisdiction of the suit pending when this third party order was granted, since there was no diversity of citizenship. The court having no jurisdiction, it could not grant authority to serve any process.”

There can be no further application of Rule 13; so our attention should be directed to Rule 14 concerning third-party practice. The *Westinghouse v. Woolley* phase of the action has no connection with this discussion unless the argument is that pursuant to Rule 14, the so-called Radkovich cross-claim (in reality a third-party claim) is ancillary to that phase of the case. In such event, it is subject to the infirmity already pointed out.

The only other consideration is whether the court has acquired jurisdiction over the Radkovich cross-claim be-

cause it is ancillary to the Miller Act action of Westinghouse.

Appellees cite the following language from Barron and Holtzoff (Vol. 1, Sec. 427, p. 865):

“The third-party complaint need not state any grounds of jurisdiction if the court already has jurisdiction of the principal action and the third-party claim needs no new grounds of jurisdiction to support it. Otherwise such grounds must be stated.”

More simply stated, if the third-party claim needs no new ground of jurisdiction to support it, none need be alleged. This is only common sense. The question remains as to whether it does or does not need independent grounds for jurisdiction.

If the third-party claim is ancillary to the main action, it needs no independent grounds for jurisdiction. Appellant asserts that it is not ancillary and Appellees assert that it is. Appellees discuss the problem in their Reply Brief in connection with Rule 13. It is difficult therefore to trace the argument as it relates to Rule 14 alone.

However, the argument is predicated upon the assumption that Westinghouse would not be able to recover under the Miller Act without proof of the subcontract and that, therefore, all of the issues are the same. This concept is set forth in italics on page 11 of the Reply Brief. This is not the law. 40 U. S. C. A. 270b, provides in its essential part:

“Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expira-

tion of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit. . . .”

In the case at bar, the court allowed Westinghouse to recover for the material which it furnished which went into the so-called extras which the court expressly found were not within the compass of the subcontract. No one interposed objection. If Appellees are right in their argument, where is the authority for this portion of the judgment?

All that the law requires is proof that the materials furnished by the plaintiff were consumed in the prosecution of the work required by the prime contract. The subcontract has no legal significance in the proof of the required facts. The Government is not concerned with where the prime contractor obtained labor and materials or how or by whom or by what authority they were obtained and installed. The Government is simply concerned with furnishing a means for assuring payment to the suppliers of labor and materials consumed in the prosecution of the work.

The question is one of jurisdiction which is governed by principles independent of the rules (*American Foman Co. v. United Dyerwood Corporation* (D. C. N. Y. 1938), 1 F. R. D. 171; *Serwchulis v. Lehigh Valley Coal Co.* (2d Cir., 1916), 233 Fed. 422). The rules themselves so provide (see Rule 82). This is the starting point for all considerations of problems of jurisdiction.

Appellees have not fully comprehended our argument on this matter. Appellant does not say that a matter must be ancillary before Rule 14 applies thereto. There are doubtlessly many applications, of the rule where jurisdiction is unquestioned. Wherever there are independent jurisdictional grounds, no one could question the effectiveness of this procedural rule. But where there are no independent grounds for jurisdiction, the legal problem must be ancillary to the main case before any party may be brought in pursuant to Rule 14.

On pages 15 through 30 of the Reply Brief, Appellees actually argue that any person who is not a party to the action, who is or may be liable to a defendant for all or part of plaintiff's claim against him, may be brought into the action, pursuant to Rule 14 without regard to any jurisdictional requirements. Rule 14, Appellees insist, is sufficient authority that where the circumstances mentioned in the rule exist, there are no other jurisdictional requirements or that all jurisdictional requirements may be ignored. Appellant asserts that Appellees' argument disregards Rule 82 and construes Rule 14 in a manner which, if it permits the Radkovich cross-claim, enlarges the jurisdiction of District Courts.

The Westinghouse claim is solely on the Miller Act bond against the principal and sureties thereon. Any claim against Glens Falls must be based, if at all, upon entirely separate contractual obligations. We have discussed the proof required to recover under the Miller Act. Witness the different and additional issues, none germane to the Miller Act, posed by this appeal. It is virtually a fact that the two cases were tried separately, for Westinghouse attended the trial only briefly at its inception.

The only real triable issues were posed by the so called Radkovich cross-claim against Appellant Glens Falls.

The effect of the differences between the main action and the Radkovich cross-claim is two-fold: (1) The Radkovich cross-claim is not authorized by Rule 14 because the third-party defendant, Appellant Glens Falls, could not be liable for any of the Westinghouse claim against Radkovich and sureties. The liability of Glens Falls, if any, is dependent upon obligations and turns upon issues which are not involved in the principal action. (2) The third-party claim is not ancillary to the principal action because it is in no sense auxiliary thereto or dependent thereon. In fact the legal issues of the respective actions are hardly germane to one another. Jurisdiction is therefore lacking because there is no independent jurisdictional basis.

The new Federal Rules of Civil Procedure were designed and adopted to expedite and improve the administration of justice. The doctrine of ancillary jurisdiction finds its roots in the same soil. But in the case at bar Appellees seek to apply these principles in a manner which, if permitted, would deflect the purposes mentioned to the accomplishment of injustice.

As pointed out in the Opening Brief, the Glens Falls payment bond is an indemnity bond against loss and not against liability. The California law on this distinction is statutory and explicit. A cause of action on an indemnity against loss only arises after the loss has been suffered by the obligee (Radkovich). It does not arise simply by the obligee's becoming liable on a judgment. (See Op. Br. pp. 61 and 65.) Appellees argue, however, that the application of Federal Procedure to this situation "accel-

erates” the cause of action or liability of Glens Falls. (Rep. Br. pp. 24-30.) The effect of the argument is that by Federal Judicial process (contrary to the result of an action in the State Courts) the contract between the parties has been converted from an indemnity against loss (as it was written) to an indemnity against liability. Or, the effect of the argument is that the Federal Courts may and should ignore the substantive law of the State of California as declared by the Legislature and the Courts of the State to apply such rules as may seem expeditious.

As a practical matter, the obligee (Radkovich) may never suffer any loss by payment on account of the *Westinghouse* action. Bankruptcy of Radkovich could discharge the liability resulting from the *Westinghouse* action and such bankruptcy could stem from other causes or, being a corporation, it could simply be broke and out of business without payment. There would, therefore, be no loss and no cause of action would ever accrue against Glens Falls. It is unjust to change this contract by procedural maneuver.

It is not only unjust, but illegal, to construe the rules in a manner which alters the substantive rights of any litigant. See the statute authorizing the Supreme Court to prescribe the rules, 28 U. S. C. A. 2072 (formerly 28 U. S. C. A. 723(b)), which provides in part:

“Such rules shall not abridge, enlarge or modify any substantive right”

See *Brown v. Cranston* (2d Cir., 1942), 132 F. 2d 631, 148 A. L. R. 1178, holding that Rule 14 cannot be invoked to circumvent the New York statute on contribution among joint tort feasons which requires that a money

judgment must first be recovered before any action for contribution may be commenced. The decision relies in part upon the analysis of Professor Moore who acknowledges that jurisdiction is a prerequisite to application of the rules.

See also:

Contracting Division, etc. v. New York Life Ins. Co. (2d Cir., 1940), 113 F. 2d 864, 865.

The following authorities support Appellant's argument. *Herrington v. Jones* (E. D. La. 1941), 2 F. R. D. 108, cited in the Reply Brief, pages 15 and 17, holds:

"Whilst, unquestionably, the weight of authority is that an independent basis of jurisdiction is not necessary to support a third party claim, and the making of L. J. Massart a third party defendant by the original defendant L. C. Jones, as third party plaintiff, was justified, it must not be forgotten that this was so only because the cause of action set up by the third party plaintiff was ancillary or auxiliary to the cause of action pleaded against him by plaintiff Herrington."

The court recognized that it was the ancillary or auxilliary nature of the action that conferred jurisdiction. It was not Rule 14 that did so.

Sussan v. Strasser (E. D. Pa., 1941), 36 Fed. Supp. 266, cited in the Reply Brief, pages 15 and 17, has nothing to do with indemnity nor insurance agreements and is miscited. The case involved a collision between two automobiles. Plaintiff who was a passenger in the automobile of the third-party defendant sued the driver of the other vehicle.

The case of *O'Brien v. Richtarsic* (D. C., W. D., N. Y., 1941), 2 F. R. D. 42 (cited in the Reply Brief at p. 17) cites District Court cases which simply state that a third-party claim does not need independent jurisdictional grounds for support and then cites the District Court cases and one Circuit Court case holding that jurisdiction must be tested by substantive law and then continued with the following helpful and analytical discussion at page 44:

“It is clear that the only ground on which jurisdiction herein can be sustained is that the claim is ancillary and not open to the jurisdictional objection.

“The law is well established that ‘Principal jurisdiction involves and carries along with itself power over matters that can properly be regarded as accessorial. * * * And by virtue of this principle the District Court has jurisdiction of many matters as ancillary over which there would be no jurisdiction, were these matters independent and standing alone.’ *Loft, Inc. v. Corn Products Refining Co.*, 7 Cir., 103 F. 2d 1, 10 (quoting Dobie on Fed. Procedure); *Venner v. Pennsylvania Steel Co.*, D. C., 250 F. 292; *Eichel v. United States F. & G. Co.*, 245 U. S. 102, 38 S. Ct. 47, 62 L. Ed. 177; *Pell v. McCabe*, 2 Cir., 256 F. 512; *Wilson v. United American Lines*, D. C., 21 P. 2d 872. Webster defines ancillary as ‘designating or pertaining to a document, proceeding * * * that is subordinate to, or in aid of, another primary or principal one; as an ancillary attachment, bill, or suit presupposes the existence of another principal proceeding.’ 1 Bouvier’s Law Dictionary, Rawle’s Third Revision, p. 194, defines ancillary as ‘auxiliary,’ ‘subordinate.’ In *Pell v. McCabe, supra* (256 F. 515), 2 Cir., certain rules of determination were laid down. So far as could be relevant here two

only need be given consideration. The ancillary process must be 'to aid, enjoin, or regulate the original suit. * * * To prevent the relitigation in other courts of the issues heard and adjudged in the original suit, * * *.' The cases last cited uniformly hold that ancillary jurisdiction in effect presupposes jurisdiction over the suit. Otherwise a claim could not be ancillary, and, of course, no jurisdiction be obtained.

"While the third party claim sets up a separate cause of action from that in the original complaint, the transactions involved in both complaints are the same, and it seems to me the clearly expressed intent of the Federal Rules of Civil Procedure is that such claims might be joined as 'in aid of the original suit' and 'to prevent relitigation of matters related to the same transaction,' and that, therefore, the third party claim is ancillary."

The holding of the court in the above quotation was included for completeness of quotation, but the facts were not stated, so the court's conclusion is of no assistance.

The case of *Glens Falls Indemnity Company v. Atlantic Bldg. Corp.* (C. C. A. 4, 1952), 199 F. 2d 60, involves the question of subrogation as a matter of right established by law. There is no question of infringement of the substantive rights of the parties since as the court points out the question is procedural. There are many other cases cited by Appellees, none of which add substantially to the force of Appellees' argument nor detract from the argument of Appellant.

II.

The Radkovich Cross-Claim Is Defective.

A. Allegations of Liability of Glens Falls Are Lacking.

Appellees' answer to the argument of the Opening Brief that this cross-claim does not state a claim upon which relief can be granted is placed upon three grounds principally: (1) That the claim need not state facts to constitute a cause of action as these terms are accepted in the State Courts; (2) That trial of the case cures all defects; and (3) Findings of the court cure such defects.

As to the first point, suffice it to say that this does not relate to Appellant's claim that the claim must in some way allege liability of the defending party. As to the other two points, Appellant asserts that Rule 15b is not intended to permit the court to adjudicate matters when no claim at all has been stated and that question is never settled by the trial court's findings since it is a question of law which may be raised at any point in the proceedings.

B. Allegations of Performance of the Subcontract Are Lacking.

It is apparent that Appellees concede that allegations of performance of the subcontract are lacking from the cross-claim. The question is, does the cross-claim state a claim upon which relief may be granted? We respectfully submit that discussion of the evidence and of the findings is entirely outside the issue.

However, Appellees do not accurately state the facts which they discuss. There is no covenant in the sub-

contract that Woolley would pay for materials and none is to be implied because Radkovich sought to protect himself from loss on this account by a payment bond. Failure of Woolley to pay Westinghouse is no breach of contract, nor is the action one for breach of contract.

What is true of the subcontract is also true of the performance bond. There is no provision requiring Woolley to pay for materials used and none may be implied for Radkovich required and received a payment bond to protect him from loss to Radkovich on this account. As soon as Appellees turn their attention to insisting that the two bonds should not be construed together, they embrace Appellant's argument on this subject. Quoting Appellees' Reply Brief, page 75:

“Also, the reasons for the conditions in the performance bond, and the absence of conditions in the payment bond are equally obvious. What Glens Falls guaranteed by the performance bond was the performance of the work of the subcontract by Woolley.”

The findings do not settle these issues. They follow the format of the cross-claim. These very findings are in part the foundation for the appeal. Appellant points out that they are erroneous, insufficient, inherently inconsistent with one another, are not supported by the evidence, and fail to support the conclusions of law and judgment. They do not in any way aid in answering the objections raised by Appellant.

Wherever there are conditions precedent to recovery upon a contract, the duty of alleging and proving performance thereof devolves upon the plaintiff, even though these same conditions may properly appear as special de-

fenses. The court must support its judgment by affirmative findings that such conditions have been performed. Finding XVIII [R. 201] does not do this. While Appellant effectively demonstrates the error of this finding, the issue at this point is, did Appellees allege performance of such conditions and the answer is, no. No authority has been cited to contradict Appellant's claim that such allegations in the claim are essential.

C. Allegations That a Loss Had Been Sustained Which Allegations Are Prerequisite to Recovery on the Payment Bond Are Lacking.

Again, there is no question but that the allegation which Appellant says is essential to state a claim is simply not there. As already discussed in this brief, Point I, the Federal Rules of Civil Procedure cannot be used as a device to alter, modify or impair the substantive rights of litigants so the theory of "acceleration" or conversion of the payment bond from an indemnity against loss to an indemnity against liability is untenable. Consequently, an allegation of loss is required to state a claim.

There is no ambiguity in the payment bond, so the cases cited on page 38 of the Reply Brief are inapplicable.

D. The Objection of Failure to State a Claim Upon Which Relief Can Be Granted Is Never Waived.

Whether a claim is stated upon which relief may be granted is a question of law. This objection does not raise an issue as to burden of proof and no findings of fact of the trial court can affect the objection one way or the other and any conclusion of law on the matter by the trial court is subject to review by appellate courts.

III.

As to Liability on the Payment Bond.

(This point is responsive to Reply Brief, Point III, pp. 41-45 thereof.)

This point in the Reply Brief contains discussion of ambiguous indemnity agreements, but no ambiguity in the bonds in issue has been pointed out, so the discussion and *Alberts v. American Casualty Co.* (1948), 88 Cal. App. 2d 891, have no application. We have already answered Appellees' argument that the bond in question has been converted into a bond against liability. It may be well to note the concession on page 45 that Appellant's argument may have significance in the State Courts. We understand that the Federal Courts are supposed to apply the same law. It is also worthy of note that the deficiencies of the evidence and ambiguities of the findings pointed to by Appellant in the Opening Brief are not supplied in the Reply Brief.

IV.

The Material Alterations of the Subcontract.

(This point is in response to Reply Brief, Point IV, pp. 46-68 thereof.)

Appellant's principal criticism of the argument of the Reply Brief is that it does not consistently follow one course. For example, the consequences of construing the two bonds together are confused with the consequences of construing them as independent of each other. The elements of one argument may be likened to the pieces of a jigsaw puzzle. The elements of one argument if properly put together present the whole picture. And like the jigsaw puzzle, parts borrowed from a different argument,

a mutually exclusive argument, confuse the picture. There is no short way to point to each instance of such confusion. Appellant will not attempt to do so.

A. There Is a Distinction Between an Authorized Modification and an Alteration of Contract.

Appellant has pointed to alterations of contract and to the law that such alterations exonerated the surety. We do not speak of authorized modifications as expressly provided for in paragraph 5 of the subcontract [R. 46]. There were no authorized modifications and Appellees point to none. The alterations complained of were unauthorized and not pursuant to the provisions of the subcontract. The waiver of notice of modifications of the contract did not refer to unauthorized alterations not authorized by the subcontract.

We read the statement on page 47 of the Reply Brief that if the bonds are construed separately, Glens Falls has consented to the alterations specified by Appellant, but see no support in the record or logic for the statement which does not follow from the argument preceding it.

The argument on page 48 of the Reply Brief is burdened with the difficulty heretofore mentioned. Radkovich required Woolley to perform as he did. Radkovich is the obligee on both bonds. If the contract was altered, it was by the act of the obligee. This is clear from the statement of facts, which was accepted by Appellees, as amply supported by reference to the record. It matters not what contrary finding the trial court made. It is Appellant's contention that contrary findings were unsupported by the evidence. This is not an attempt to persuade the appellate court to reweigh conflicting evidence. The only evidence is contrary to the findings and the

findings are opposed to each other. If not impeached by the evidence they are impeached by each other.

The trial court found that all of Woolley's materials obtained from Westinghouse and all of Woolley's materials obtained from Radkovich (and these were the two sources from which Woolley obtained materials) went into the subcontract. The court also found that \$8,277.67 worth of labor and materials furnished by Woolley went into the work but not into the subcontract work but were extras. These were obtained by Woolley from Westinghouse or Radkovich. Note the conflict. The court found both that all of these materials went into the subcontract and that a substantial part thereof did not. It can't be both. Appellant asks, "Which?" It is the duty of the trial court to resolve conflicts in the evidence, if such exist. Appellees avail themselves of the convenience of being on both sides—citing a finding on one side to support one argument and a finding on the other side to support an inconsistent one.

B. Alteration of the Subcontract by Imposition of Extras.

Appellant is satisfied that the Opening Brief adequately demonstrates that the subcontract was altered by the so-called extras and that since no evidence not discussed in the Opening Brief is mentioned in the Reply Brief, there is nothing to show that findings were supported by the evidence. It should be observed, however, that Woolley did not claim that the so-called extras were anything but additions to his subcontract. Mr. Radkovich said that they were within the terms of the original subcontract. Woolley said that they were additions to it. This was the conflict. It was the court's own idea that these extra items were a thing apart from the subcontract and this idea has no support in the evidence.

C. Whether the \$4,000.00 Payment Was a Loan or an Advance, There Was Still a Payment to Woolley in Excess of the Amount He Had Earned.

Based upon the discussion in the Opening Brief, a tabulation of the payments and earnings excluding the \$4,000.00 results in a prepayment of \$5,063.34. This is neither a matter of juggling figures nor of asking the court to reweigh the evidence. It is a simple analysis of all of the available evidence. It is not a matter of conflict therein, but resolution thereof. This is the duty of the trial court. Finding XVIII [R. 200] doesn't resolve the issue.

Was there a prepayment, is the question. What was due each month is another matter. The evidence clearly indicates a prepayment, but the court did not find as to whether there was or was not a prepayment. Appellant is entitled to such a finding.

Whether the \$4,000.00 was a loan or a discounted prepayment is adequately discussed in the Opening Brief.

The remaining portion of the Reply Brief concerns matters which have already been touched upon above or which have been adequately treated in the Opening Brief.

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Appeal From the United States District Court, Southern
District of California, Central Division.

PETITION FOR REHEARING AND CERTIFICATE OF COUNSEL.

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No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the
Use of Westinghouse Electric Supply Company, Wm.
RADKOVICH COMPANY, INC., *et al.*,

Appellees.

Appeal From the United States District Court, Southern
District of California, Central Division.

PETITION FOR REHEARING AND CERTIFICATE OF COUNSEL.

Appellant, Glens Falls Indemnity Company, respectfully petitions for rehearing in the above cause and Albert Lee Stephens, Jr., one of Appellant's counsel herein does hereby certify that in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

Part I.

As Grounds for Rehearing, Petitioner Respectfully Makes Four Points, in Part I of This Petition Followed by Authorities in Support Thereof in Part II Hereof.

1. The Court Has Erroneously Concluded,

“Failure of performance of conditions precedent is a matter of affirmative defense.” (Op. p. 7.)

We respectfully represent that this is the first time any court has decided a case on this principle and that it is a most serious error contrary to both procedural and substantive state and federal law.

As a procedural matter this is erroneous and contrary to provisions of the Federal Rules of Civil Procedure, Rule 9c.

As a substantive matter this concept has precluded recognition that performance of express conditions precedent to recovery must be *proved* by a plaintiff to warrant recovery and has caused the Court to overlook the express written contractual limitations to Appellant’s liability as embodied in the Performance Bond of Appellant which is the agreement upon which recovery by Appellees is wholly dependent, to wit:

“This Bond is Executed Upon the Following Conditions Precedent to the Right to Recover Hereunder.” [R. 52.]

The further result of this error is to relieve the plaintiffs (Appellees) of the burden of proof of right to

recovery as though a defendant is *presumed to be liable* and has the burden of affirmatively proving the contrary.

Since proof of performance of conditions precedent is entirely lacking, it has further resulted in erroneously fixing liability of Appellant upon the Performance Bond, contrary to the intentions of the parties, which has in turn resulted in a failure to decide the fundamental issues of the appeal in connection with the Payment Bond.

In this connection, Appellant has asserted that performance of express conditions precedent in the Performance Bond was neither pleaded nor proved. The Court further erred in this connection by stating,

“* * * the facts were found by the trial court to the contrary of the basis on which such defense is now asserted.” (Op. p. 7.)

After careful re-examination of the findings, Appellant respectfully represents that they contain no reference whatsoever to performance of conditions precedent or to facts which would establish that such conditions had been performed.

2. The Court Held on Page 7 of the Opinion,

“* * * Each of the bonds was a separate and distinct surety undertaking of Glens Falls and *each was intended for a distinct and separate purpose.* * * *” (Emphasis ours.)

This holding could only mean that the Performance Bond guaranteed performance and the Payment Bond

guaranteed payment, subject, of course, to the limitations contained in the respective bonds. What other purposes exist?

Observing the distinction quoted above, the Performance Bond would logically be eliminated as a basis for recovery on any matter relating to payment for materials and becomes irrelevant to the action.

Although the distinction is made to answer the argument that both bonds are affected by the conditions precedent which only appear in the Performance Bond, should this distinction not apply across the board?

Doesn't the option blow both hot and cold when this appears on the same page:

“The Glens Falls performance bond indemnified Radkovich against a failure by Woolley to perform the subcontract. * * * Woolley did not fully and promptly pay for the materials * * *. This was just as much a breach of performance as if the electrical work specified in the contract was not completed. * * * Appellant was liable * * * under the performance bond * * *.”

In the face of this interpretation of the Performance Bond, what is the “distinct and separate purpose” of the Payment Bond?

3. **The Decision Construes Rules 13 and 14 in Such a Way as to Give Judgment Against Appellant on a Non-Existent Cause of Action.**

The words “is or may be liable” which appear in Rules 13 and 14 refer to *who* “is or may be liable” under an existing cause of action. These provisions do not contemplate a suit or a judgment on a cause of action which will not arise against the cross-defendant or third party defendant as a result of the judgment in the principal action.

No claim can be stated under the Federal Rules unless a cause of action based upon substantive law exists. (See 28 U. S. C. A. 2072):

“Such rules shall not abridge, enlarge or modify any substantive right. * * *”

The substantive law of California is such that no claim can be stated upon the Payment Bond in this case. See California Civil Code, 2778:

“Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified *is not entitled to recover without payment thereof*; * * *.” (Emphasis added.)

The Court has misconstrued *Alberts v. American Casualty Co.* (1948), 88 Cal. App. 2d 891, at page 7 of the Opinion. This case merely held that the bond in the *Alberts* case was a liability bond and not a loss or damage

bond as is the bond in this case. The *Alberts* case did not interpret the law applicable to the bond in the present case.

The decision of this Court is exactly contrary to the decision of *Brown v. Cranston* (2d Cir., 1942), 132 F. 2d 631, 148 A. L. R. 1178, which was cited in the briefs. Failure to recognize this authority or to mention the point of the effect of the substantive law of California leaves a decisive issue of the appeal undecided and militates against the opportunity to settle this important question of law by certiorari.

- 4. This Court Has Cited Cases Indicating That a Proper Record Is Not Before the Appellate Court and That the Findings Settle the Issues. We Respectfully Urge That the Entire Record Is Before This Court and That the Findings Are Entirely Lacking or Not Responsive to the Issues Raised by Appellant or Are Inherently Inconsistent. These Issues Are Therefore Not Settled.**

The finding that all of the Westinghouse materials went into the subcontract work [Findings XI and XII, R. 196] is clearly erroneous in face of Woolley's uncontradicted testimony:

“Q. And that obligation to Westinghouse is for materials furnished on this job, is that true? A. That is right.

Q. And those materials are not involved in any of those extras, are they? A. Yes; they are.” [R. 457.]

and is further clearly erroneous and hopelessly conflicting with Finding XV [R. 198] that:

“Woolley furnished additional labor and materials not required under the prime contract * * * which were actually used in additions to the structures * * *.” (The extras.)

The trial court fully recognized the facts supporting Appellant's defense of Alteration of Contract by premature payment to Woolley by payments over a two month period to November 1, 1947, but limited its findings in a manner unresponsive to this point by saying that it was impossible to tell what Woolley earned in any *one* month.

We respectfully urge the Court to examine and consider the effect of the computations on the following double page.

WOOLLEY'S PREMATURE PAYMENT.

QUESTION :

How Much Was Woolley Entitled to Be Paid on November 1, 1947

Materials (All concededly compensable)	\$13
Labor	1

(Note: Woolley's November 1, 1947 estimate included labor at \$3,439.38 [Exhibit 13.] Compensable labor was \$1,824.95. Non-productive labor, which was non-compensable, was \$949.22. Subtracting these two items leaves an overcharge with no basis whatever of \$665.21, which is non-compensable. See Trial Court's comment below.)

Total which Woolley had earned on November 1, 1947	\$14
Subtract 10% retention required by the contract	1

ANSWER :

Woolley Was Entitled to Be Paid This Total	\$13
--	------

QUESTION :

Was Woolley Paid More Than He Was Entitled to Be Paid?

Total paid for work to November 1, 1947	\$20,000.00
Total payment to which Woolley was entitled	13,443.00

ANSWER :

Yes, Woolley Received Overpayment of	\$ 6,557.00
--------------------------------------	-------------

Quoting from Trial Court's Memorandum of Conclusions [R. 120-121]:

"The first estimate, dated September 25, 1947, shows materials listed as been received on the job site in the total sum of \$9,404.37, with sales tax and bringing the total to \$9,885.37; no labor cost is listed. On this estimate, was paid \$5,000.00.

"The next estimate, November 1, 1947, for the month of October, shows the materials listed on the previous estimate plus some other materials, and the r 'materials to date, \$13,111.71' and 'labor costs to date, \$3,439.38.' The total est in the sum of \$16,551.09. Woolley's pay roll [Exhibit 12] beginning August 2 to October 29, 1947, inclusive, adds up to \$2,774.17. Woolley testified th August 28, 1947, to October 1, 1947, his men did no work on the job except bing at a pay roll cost of \$200.00, leaving an inactive pay roll up to October sum of \$949.22. Subtracting this sum we have a total of \$1,824.95 for actual la going into the job up to November 1. On October estimate Woolley testified paid \$15,000.00, which is about the amount of the estimate less the retaine However, included in this estimate was material costing about \$9,404.37 fo

IT'S IN THE BOOK.

total payroll from starting job on August 28, 1947
 October 29, 1947 \$2,774.17

(see quote on prior page from Trial Court's Memorandum
 Conclusions; see Exhibit 12.)

non-compensable labor charge 949.22

(see Finding XVI [R. 199]: "That by reason of this
 delay Woolley was damaged in the amount of \$949.22 for
 which sum Radkovich is indebted to Woolley but no part
 of said sum is due or owing from Radkovich's Sureties to
 Woolley."—indicating that this was not proper to include as
 compensation for work but only recoverable as damages for
 delay which the contract does not include in the payment
 schedule; see also, quote from Trial Court's Memorandum
 on previous page; see Woolley's testimony [R. 397, 454,
 5].)

which is compensable labor \$1,824.95

Contract provides for progress method of payment in the
 manner provided by Article 16 of the prime contract (Subcontract
 [R. 44, 118].)

Article 15 of prime contract requires 10% retention [R. 118-119]:

(b) In making such partial payment there shall be retained
 from the estimated amount until final completion and accept-
 ance of all work * * *."

\$10,000 was paid on 1st estimate dated Sept. 25, 1947 [Finding
 XVII, R. 200, 261, 427, 120.]

\$10,000 was paid on 2nd estimate dated Nov. 1, 1947 [R.
 428, 120].

\$20,000 Total payments for job to Nov. 1, 1947 (See Court's
 comment on opposite page.)

Woolley had already been allowed \$5,000.00 for September plus about \$9,404.37
 for October, and actual labor cost of \$1,735.95 for which he was allowed
 \$1,393.38 less 10%."

In memorandum of Conclusions the Trial Court further said:

"We might be able to figure what percentage of the total amount of the
 estimate each estimate represented, there is no evidence that the work covered by
 the estimate represented the same percentage of the work called for by the subcontract."

"We are of the opinion that there is 'no way in the world' for counsel or the
 court to ascertain from the evidence just what amount in any one payment date the
 contractor was entitled to receive; . . ." [R. 125.]

Woolley respectfully submit that the evidence nevertheless establishes a substantial pro-
 portion of the work done and it is manifest that the materials were paid for twice and that the pro-
 portion could not have produced progress in proportion to the amount paid.

Part II.

Authorities in Support of Grounds for Rehearing.

1. The Court Has Erroneously Concluded.

“Failure of performance of conditions precedent is a matter of affirmative defense.”

A. PERFORMANCE OF CONDITIONS PRECEDENT MUST BE ALLEGED IN THE COMPLAINT.

We quote from Ohlinger’s Federal Practice, revised edition, Vol. 3, page 167:

“Rule 9(c) requires plaintiff to plead generally the performance of conditions precedent, . . .”

Rule 9(c) provides:

“In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. . . .”

The wording of the rule is explained by Barron and Holtzoff, Volume 1, page 553 of Rules Edition:

“The rule marks a departure from the common law practice which required the detailed pleading of performance of conditions precedent.”

and comments on page 551:

“The rule controls and state rules of practice are not applicable in federal district courts. This does not mean, however, that there is no necessity for alleging performance or occurrence of conditions precedent. On the contrary the pleader must allege such compliance or that performance or occurrence was waived or excused.”

cites *McAllister v. City of Riesel, Tex.* (C. C. A. 5th, 5), 146 F. 2d 130, followed in 146 F. 2d 131, certiorari denied 65 S. Ct. 1195, 325 U. S. 860, 89 L. Ed. 1981, which affirmed dismissal of a complaint and from which quote:

“The complaint as amended does not allege the performance of the conditions precedent to Plaintiff’s right to recover; nor does it allege that such performance was wrongfully prevented by the City; nor that the period from September 2, 1935, until July 15, 1938 was not a reasonable time within which to perform the conditions precedent; nor was the performance of the conditions precedent in any wise alleged or excused.”

The following additional federal cases which are directly pertinent are cited:

Landow v. Wolverine Hotel Company (D. C. Ill., 1940), 33 Fed. Supp. 705;

Keegan v. Rupert (D. C. N. Y., 1941), 2 F. R. D. 8.

See *Encyclopedia of Federal Procedure*, 2d Edition, Vol. 661, Section 1350:

“Where defendant’s obligation is predicated on a condition precedent, a complaint failing to allege compliance with the condition precedent is obviously insufficient.”

In this connection it has already been pointed out that a claimant must bring himself within the conditions of the policy. This raises a question of interpreting the policy. The 9th Circuit has this to say on the subject in *Home Indemnity Co. of New York v. Standard Acc. Ins. Co.* (C. A. A. 9th, 1948), 167 F. 2d 919, 923-924:

“4. The Rule of Construction

“The ancient rule that all intendments in an insurance policy are to be construed favorably to the insured has one important limitation; namely, that where the language of any given provision of the policy is clear, that language must be followed. In other words, where there is no ambiguity, there is nothing left to be construed. In such a situation, when a party seeks to read something into the contract of insurance that is not there, a court must perforce say, with Shylock,—‘Is it so nominated in the bond? * * * I cannot find it; ’tis not in the bond.’

“This is the teaching of the cases in California and elsewhere. In *Carabelli v. Mountain States Life Ins. Co.*, 8 Cal. App. 2d 115, 117, 118, 46 P. 2d 1004, 1006, hearing denied by the Supreme Court of the State, the court said:

“ ‘The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms. Thus the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity. (Cases cited).’

“The same doctrine has been recognized by this court. In *Fidelity Union Fire Ins. Co. v. Kelleher*, 9 cir., 13 F. 2d 745, 746, Judge Hunt said:

“Following the steadily adhered to decisions of the Supreme Court, it is seen that the present case is directly within the well settled rule of the federal courts, that the terms of the policy are the measure of the liability of the insurer, and that, to recover, the insured must prove that he is within those terms. In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231, the court said: “It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made.” ’ ’ ”

California Civil Code, Section 1439 has already been quoted above and it is apparent from the *Home Indemnity Co.* case above cited that the cause of action itself depends upon the claimant being able to bring himself within the terms of the bond and that this is a substantive requirement.

E. THE COURT PROBABLY RELIED UPON A STATEMENT FROM APPELLEES’ BRIEF WHICH HAS NO LEGAL SUPPORT.

Appellees’ brief stated that conditions precedent are a matter of affirmative defense citing *Standard Oil Co. v. Houser* (1950), 101 Cal. App. 2d 481, which contains a misleading statement which is pure dictum. After point-

ing out that the case involved an unconditional guarantee, the Court said at page 488:

“Defendant admitted the execution of the guaranty in the terms pleaded in the complaint. He did not plead any limitation, condition precedent, exoneration, or any similar defense. Such matters are affirmative defenses and are not available unless pleaded. (Code Civ. Proc., Sec. 437; *Blackwood v. McCalum*, 187 Cal. 655, 659 (203 P. 758); *Pacific M. & T. Co. v. Massachusetts B. & I. Co.*, 192 Cal. 278, 285 (219 P. 972); *Hobson v. Metropolitan Casualty Ins. Co.*, 120 Cal. App. 727, 730 (8 P. 2d 150).)”

None of the cases cited by the Court involve express conditions precedent. The statement was not entirely irrelevant because it appeared that the defendant was urging that matters which did not appear on the face of the unconditional guarantee were conditions precedent. It may well be that any such conditions such as collateral agreements constituting conditions precedent would be matters of special defense.

Appellees also cited *Jack Mann Chevrolet Co. v. Associates Inv. Co.* (C. C. A. 6th, 1942), 125 F. 2d 778, which deals with pleading release and abandonment and does not mention conditions precedent; and *State Farm Mutual Auto Ins. Co. v. Koval* (C. C. A. 10th, 1944), 146 F. 2d 118, which did not involve a condition precedent, but rather apparently a simple covenant; and *Phillips v. Baker* (C. C. A. 9th, 1941), 121 F. 2d 752, which contains no reference whatsoever of conditions precedent. Appellees' statement is entirely unsupported.

2. **This Court's Holding Concerning the Two Bonds That "Each Was Intended for a Distinct and Separate Purpose" Should Eliminate the Performance Bond as a Basis of Judgment Against Appellant.**

The Opinion is patently inconsistent when it holds that each bond was given for a "distinct and separate purpose" and then holds that Appellant was liable under the Performance Bond. The only separate purposes were performance and payment respectively.

The distinction and the result thereof is noted and well established by California decisions. In *Lamson Co. Inc. v. Jones* (1933), 134 Cal. App. 89, 24 P. 2d 845, the Court was faced with the contention that notwithstanding the fact that a payment bond had been furnished, plaintiff had a right to recover upon the performance bond. Note that this was after the decision in *Pacific States Co. v. U. S. Fidelity & G. Co.* (1930), 109 Cal. App. 691, 293 Pac. 812, cited by this Court in the case at bar and which involved a single all purpose bond. The California District Court of Appeal held at pages 91-92:

"Appellant urges that it has a right of action on the faithful performance bond exacted of the contractor under the contract and which was also furnished by respondent. Such bond runs to the city of Glendale only, and there is no provision therein which runs to the benefit of labor and materialmen. It is well settled that where a separate bond has been filed complying with the statute and inuring to the benefit of laborers and materialmen, no recovery can be had by a laborer or materialman upon the faithful performance bond executed in connection with the same contract which does not by its terms inure to his

benefit. (*Maryland Casualty Co. v. Shafer*, 57 Cal. App. 580 (208 Pac. 192); *Summerbell v. Weller*, 110 Cal. App. 406 (294 Pac. 414).)”

The intention to supply a payment feature which is implied in a surety bond in instances where there is only one bond is expressly negated when the parties have provided a separate bond for this express purpose.

The *Lamson* case turns upon a determination of the intentions of the parties and its principle is the same whether the person claiming recovery on the performance bond in such circumstances is a laborer or the obligee. The liability on the bond depends upon the intentions of the respective contracting parties. In the *Pacific States Electric Co.* case the Court construed the contract as evidencing the intention to supply a payment feature in the one bond supplied.

In the face of this Court's determination that each bond “was intended for a distinct and separate purpose,” the *Pacific States Electric Co.* case is not authority for judgment upon the performance bond. We respectfully submit as to this question that if the Court entertains any further doubt as to the matter of intention in this case, an opportunity for further argument should be afforded.

The final determination of this inconsistency is far reaching because once the performance bond is eliminated as a basis for liability, there are points on appeal which have not been decided relative to both the jurisdiction of the Court and procedural and substantive law when the payment bond is relied upon as a basis for the judgment.

3. **The Decision Construes Rules 13 and 14 in Such a Way as to Give Judgment Against Appellant on a Non-Existent Cause of Action.**

We have heretofore pointed out with reference to the Performance Bond and with citation of decision of the 9th Circuit that if express conditions precedent to recovery are not shown to be performed or excused, there is no cause of action. The point here made rests upon an independent basis.

We quote from pages 6 and 7 of the Opinion of the Court:

“Appellant asserts that the Glens Falls payment bond was a contract of indemnity against loss only and did not also provide indemnity against liability. Based on that assertion it is contended that no recovery on the payment bond could be awarded until after actual payment by Radkovich Co. or its sureties of a loss for which indemnity was provided by the bond. As shown above, a pleading of payment was not required because of the provisions in Rules 13 and 14. Appellees contend that the same rule provisions allow acceleration of accrual of claim to prevent circuity of action even if the payment bond provides indemnity against loss only, citing to such effect: (Citations omitted). Determination of this contention is not necessary under the circumstances of this case since in a closely similar situation in *Alberts v. American Casualty Co.*, 88 Cal. App. 2d 891 (1948) the contract was held to indemnify against liability. We apply the same interpretation of California law to the Glens Falls payment bond in the present case.”

Rules 13 and 14 recognize that liability of one party may be a contingency to the liability of another and that circuitry of action will be avoided if all parties are able to be brought into one action. But in such a case the facts and circumstances which have given rise to the claim against the first defendant have already happened. All that remains to be determined is the result. The result as to the original defendant may be contingent upon proof and the liability of the second or cross-defendant or third party defendant may be contingent upon the liability of the original defendant.

We believe that the Court has overlooked the distinction between the situation contemplated by the rules as above described and the circumstances of this case. Any cause of action to be cognizable must have accrued, or to put it another way, it must be one based upon a right established by the substantive law (in this case the law of California). The Federal rules do not create substantive rights or rights to recovery. In fact they are limited by law as follows:

“Such rules shall not abridge, enlarge or modify any substantive right . . .” (28 U. S. C. A. 2072.)

The substantive right to recover under the Payment Bond is expressly limited by statute of the State of California and in applying the rules the Court is not authorized to “*abridge, enlarge or modify*” the right of recovery therein recognized.

California Civil Code, Section 2778 provides:

“Upon an indemnity against claims, or demands or damages, or costs, expressly, or in other equivalent terms, the person indemnified is *not entitled to recover without payment thereof*. . . .” (Emphasis added.)

The *Alberts* case cited in the quoted portion of the Opinion has been misconstrued as enunciating a rule of law while actually it is a case wherein an ambiguous bond was construed according to the intentions of the parties. The Court held that the parties intended the bond as protection against liability and not merely loss or damage. The true interpretation of the pertinent issue is to be found in *Ramey v. Hopkins* (1934), 138 Cal. App. 685, 88, 33 P. 2d 433, from which we quote:

“ . . . A liability is not a damage, according to the signification of that term as employed in contracts of indemnity, and it has been said that courts have no authority to insert the term ‘liability’ in a contract, and then proceed to enforce the contract as they—but not the parties—have made it. . . . the right of action upon a bond indemnifying against loss or damage accrues only, and at the time when the indemnitee suffers actual loss by being compelled to pay, and the actual payment of damages. . . . Nor is it necessary to cite further authorities that before an action can be begun upon a contract of indemnity insuring against loss or damages the damages must have been paid as required by subdivision 2 of section 2778 of the Civil Code.”

Clearly interposed between liability of Woolley and liability of Glens Falls is the Payment Bond. The liability of Glens Falls is entirely dependent upon the terms thereof. So that even if Woolley is liable, a new and further additional event must take place before Glens Falls is liable, to wit, actual payment by the obligee Radkovich so that he has suffered the *damage* concerning which the bond was given. This may never come to pass. Particularly is this true in the instant case because Radkovich is broke. [R. 307-308, 479.]

Obviously then, when Rule 14 (and similarly Rule 1) provides that a defendant may bring in as a new party a person "who is or may be liable to him for all or part of the plaintiff's claim against him," the rule refers to the "*plaintiff's claim against*" such defendant and not to an independent contractual duty to reimburse the defendant in certain contingencies which have not yet happened and may never happen. That is to say that the rule permits all parties to be brought in who may be liable on the substantive right of the plaintiff which has become actionable but it does not sanction adjudication of contingent rights which even a final judgment in favor of the plaintiff does not render actionable, but which will ripen only upon the happening of a further event after judgment.

Any executory contract presents a situation where one or both of the parties may be liable in the sense that some future event may cause liability. But no action may be maintained for a monetary judgment until the contingency has come to pass and the amount of damages is ascertainable.

We respectfully submit that the Court has sanctioned a judgment upon a non-existent cause of action through a misconstruction of the rules.

This principle is the crux of Appellant's contention that ancillary jurisdiction over this cause of action is lacking because the subject matter of Glens Falls' liability is its indemnity contract which does not become actionable simply by judgment on the plaintiffs' claim against Raskovich or Woolley or both.

It is necessary to "abridge, enlarge or modify the substantive right" of Glens Falls to grant a judgment against it in the face of the California statute noted pursuant to which there is or is not a substantive right of action.

the judgment granted in the Federal Court could not have resulted in the State Court. We submit that the holding of *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, is directly in point.

Arising upon the same contentions is the case of *Brown v. Cranston* (C. C. A. 2d, 1942), 132 F. 2d 631, 148 L. R. 1178. The decision was written by Augustus Hand, Circuit Judge. It directly raised the conflict between Rule 14 and Rule 82. The action was for contribution between joint tort-feasors which as authorized by a statute of the State of New York, permitted judgment in favor of one joint feisor against another only after judgment against such joint feisors had been rendered and then only after one of them had *paid* more than his pro rata share of the judgment.

The decision included the following quotation of an analysis of the situation by Professor Moore in his treatise on the Federal Rules of Civil Procedure:

“But until the right of contribution is changed, federal courts sitting in New York should follow the New York law as outlined above. As a consequence if X and Y, in *pari delicto*, negligently injure A, and A sues only X, X has no substantive right against Y for the federal court to enforce, and hence the procedure outlined in Federal Rule 14 is not applicable. . . .”

Judge Hand pointed to a difference of opinion between the judges of the New York Court of Appeals which had determined that the statute in question declared the substantive law of New York and concluded the opinion as follows:

“ . . . While Sears and Crouch, J. J., had regarded Section 211-a as creating a substantive, though

inchoate, right of contribution upon which section 193(2) might operate, their views were discarded by the Court of Appeals because no substantive right was shown to exist upon which Section 193(2) could rest. We think it reasonably clear that the decision in *Fox v. Western New York Motor Lines, Inc.*, 257 N. Y. 305, 178 N. E. 289, 78 A. L. R. 578, set forth the substantive law of New York rather than a mere procedural rule.

“While Rule 14, unlike Section 193(2) of the New York Civil Practice Act, gives the defendant a right to bring in a third person, ‘who is or may be liable . . . to the plaintiff,’ in view of the decisions of the Supreme Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, and *Klaxon Co. v. Stentor Electric Co.*, 313 U. S. 487, 496, 85 L. ed. 1477, 61 S. Ct. 1020, we do not feel justified in so construing this rule as to give the defendant a recovery which could not be obtained through any remedy available in the New York State Courts. To do so would attach a greater significance to the choice of the forum than those authorities would seem to sanction. Inasmuch as the original defendant in the case at bar could obtain no contribution in New York, if we held that Rule 14 governed, ‘the accident of diversity of citizenship would . . . disturb equal administration of justice in coordinate state and federal courts sitting side by side.’ *Klaxon v. Stentor Electric Co.*, 313 U. S. 487, at page 496, 85 L. ed. 1477, 61 S. Ct. 1020, at page 1021. Such a disposition would be contrary to the whole theory of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487.

“In spite of the great convenience and advantage of applying Rule 14 in the present case we feel im-

pelled to hold that we are precluded from doing this by the interpretation of the New York statutes by its highest court.”

The decision of this Court with which this petition is concerned affirms the judgment of the Trial Court against Glens Falls based upon the Payment Bond. The Ninth Circuit is therefore directly opposed in viewpoint to the Second Circuit. We respectfully urge reconsideration of the Opinion to the end that the Ninth Circuit should agree with the Second Circuit or should make its difference of opinion apparent on the face of the Opinion.

4. The Court Has Indicated That a Proper Record Is Not Before the Appellate Court.

From the citation of *U. S. v. Foster* (9th Cir., 1941), 123 F. 2d 32 and *Anderson v. Federal Cartridge Corp.* (8th Cir., 1946), 156 F. 2d 681, it would appear that the Court considered that the record is so incomplete that the issues raised by Appellant can't be considered. It raises the thought that the Court would review the evidence if it could.

We hasten to urge the Court to examine the record presented should this have in any way hampered review of the case. All of the testimony of all of the witnesses is in the record as are also all of the pleadings, the Trial Court's Memorandum of Conclusions, numerous letters between the trial judge or his law clerk and counsel, proposed findings which the Court put aside to draw its own, judgment and notice of appeal. Exhibits were submitted in their original form as provided for by rules of court.

We respectfully submit that the entire record is before the Court and counsel for Appellant plead, "Not Guilty" to their indictment, which their clients can hardly under-

stand after paying \$1,485.00 to the Clerk to have the record printed.

We have again pointed with particularity to the specific parts of the record upon which we have relied to establish a premature payment to Woolley and the conflict between the findings and the only evidence at one point and conflict of certain findings with others. In the event that a portion of the transcript has not heretofore come to the attention of the Court through some mischance, we trust that the questions raised in Appellant's briefs and the law applicable thereto in the briefs will be re-examined.

Conclusion.

For the reasons herein stated it is respectfully submitted that a rehearing should be granted in this cause.

JOHN E. McCALL,

J. HAROLD DECKER,

ALBERT LEE STEPHENS, JR.,

By ALBERT LEE STEPHENS, JR.,

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Indemnity Company.*

